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BY
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OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW ;
AND
MILES WALKER MATTINSON, Esq.,
OF GRAY'S INN, BARRISTER-AT-LAW ;

SECOND EDITION

BY
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AND
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OF GRAY'S INN, BARRISTER-AT-LAW.
(JOINT AUTHORS OF "THE LAW RELATING TO CORRUPT PRACTICES AT ELECTIONS.")

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PREFACE

TO THE SECOND EDITION.

ONE of the main objects of the Rules of 1883 is to secure greater brevity in the pleadings in use in the High Court. The Authors have endeavoured to enter into the spirit of the new system; and this has involved a complete recasting of the forms contained in the first edition of this work. They trust, however, that they have been in no case led by their desire to avoid prolixity into a sacrifice of that precision of statement which, though little enforced by the letter of the Rules, is none the less important in practice.

The space left at the Authors' disposal by the material curtailment in the length of the forms which they have effected has enabled them to enlarge the scope of the work. They have included in this edition a selection of pleadings adapted to the classes of actions assigned to the Chancery Division; and they have appended to them Notes, treating of such portions of the law as seemed likely to be useful to the practitioner.

No work of precedents can meet one tithe of the cases which will arise in actual practice; and no doubt the fact that this is so is a deduction from the value of every work of the kind.

But the Authors trust it will be found that they have so varied the forms contained in this edition, that it will rarely happen that the practitioner will experience any difficulty in adapting some one of them to the case for which he has to provide.

The Authors are much indebted to their friend, Mr. Kighley Hough, of the Chancery Bar, who has prepared the Index, and lent them other material assistance throughout the preparation of the work.

M. W. M.
S. M.

1, THE CLOISTERS, TEMPLE,
January, 1884.

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 — v. Finch Hatton, 582
 — v. Hodson, 290
 — v. Lancashire Rail. Co., 232
 — v. Lloyd, 305
 — v. Willani, 366
 — v. Wigg, 287
 Wiltshire Iron Co. v. Great Western Rail. Co., 568
 Wimbledon and Putney Commons Conservators v. Dixon, 555
 Winshurst v. Deeley, 494
 Winchmire v. Winchmire, 289
 Winspear v. Accident Insurance Co., 343
 Winstone v. Linn, 131
 Winterbottom v. Lord Derby, 436
 Wolverhampton J. Co. v. London and North-Western Rail. Co., 537
 Wood v. Bell, 566
 — v. Boosey, 245
 — v. Brown, 253
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 Woodland v. Fear, 153
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 Yeatman v. Snow, 23
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 Yorkshire Engine Co. v. Bright, 143
 Young v. Austen, 189
 — *Ex parte*, 452
 ZENOBIO v. Axtell, 253
 Zunz v. South Eastern Rail. Co., 230

ADDENDA.

Page 22, line 27.

When a writ is specially indorsed no further statement of claim can be required, and if required the plaintiff may sign judgment for default of a defence ten days after appearance, *G. v. H.*, Weekly Notes, 1883, p. 233.

Page 27, line 19.

The forms of pleading appended to the Rules of 1883 are not to be slavishly adhered to, although the pleader must endeavour to state his case as succinctly as possible. Accordingly, a statement of claim in a salvage action drawn exactly in the Form No. 6 of Appendix C. to the Rules of 1883, was held insufficient, and on motion, a fuller statement of claim was ordered. In salvage actions a fuller Form than the Form No. 6 should generally be used. *The Isis*, 8 P. D. 227.

Page 53, line 31.

A notice to admit facts may be delivered with the statement of claim, and there is no power to set it aside. *Crarford v. Chorley*, Weekly Notes, 1883, p. 198, *per* Field, J.

Page 53, line 31.

A summons to set aside a statement of claim on the ground that it shows no cause of action, is improper. Such an objection should be raised by the defence under R. S. C. Order XXV., r. 2. Rule 4 of the same order only applies to frivolous actions. *Parsons v. Burton*, Weekly Notes, 1883, p. 215.

Page 78, last line.

To an action on a policy of marine insurance a plea that an official inquiry was held into the circumstances of the vessel's loss, and it was found that the ship was unseaworthy, is bad, as scandalous and embarrassing. *Smith v. British Marine Insurance Association*, Weekly Notes, 1883, p. 232.

PLEADING

UNDER

THE JUDICATURE ACTS.

CHAPTER I.

PARTIES TO PLEADINGS.

UNDER the new practice the subject of parties has become one of increased importance to the pleader. This is in consequence of the additional latitude allowed in joining parties at the commencement of the action and the greater modifications permitted during its progress. It is true that in not a few instances before the case comes before the pleader, the parties to the action have been selected, and their names already appear on the writ. Still, in such a case, as in every other, a preliminary question presses upon the pleader before he proceeds to settle the exact form and wording of his pleading, viz., Are the parties in this action properly joined, so as to enable my client most advantageously to present his case to the Court and obtain the greatest possible amount of relief? If any error has been committed in the joining of the parties, it is his place to have it immediately rectified, for which, as will be seen, there is now provision at almost any stage of the action.

Importance to the pleader of rules as to parties.

It is proposed in this place to draw attention to the principal rules now prevailing on the subject of parties—not to deal with the question who are the proper parties in any given kind of action, as whether husband and wife should sue together in such a case, or the husband alone—but assuming that a particular subject-matter of action is obtained, to indicate what classes of persons may sue as plaintiffs or be sued as defendants, and when and how any modifications in the parties to the action may be obtained during the progress of the suit.

Outline of chapter.

It is thought that the subject will be best considered with reference to—

1st. The right which a plaintiff has at the initiation of the action to join parties to the suit.

2nd. The right which a defendant has along with his defence to join new parties to the action.

3rd. The right which either party has during the progress of the action to apply to the Court for leave to add, substitute, or strike out parties, and the power of the Court to grant or refuse such application.

Persons
claiming
jointly,
severally,
or alter-
natively.

1st. *The right of the plaintiff at the initiation of the suit to join parties.*—This right extends to the selection of proper plaintiffs as well as proper defendants, so that the first question is—Who can properly be joined together as plaintiffs in the same action? Turning to Order XVI. r. 1, we find that “*all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist*”—so far there is no enlargement of the right of joining parties, for under the old system the mere number of the plaintiffs was no objection provided they all sued jointly in respect of a joint cause of action. But the rule goes further: “*All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative.*” These words are of a most sweeping and comprehensive character. That they give a right of joining parties as plaintiffs far in excess of anything allowed under the old system is clear; but what limit is now left upon the plaintiff’s right is by no means so clear.

“Jointly.”

Analysing this rule carefully, it will be seen that several plaintiffs have a right to sue together in three cases. There is the case where they all have a joint claim against the defendant or defendants, as where they are joint promisees on a contract, or joint covenantees in a bond, or when, being traders, they have been jointly slandered in the way of their trade. In all these cases, and many others of the like kind, there is no difficulty. Under the old system they might have sued together in respect of this joint cause of action, and the rule merely in terms preserves this right. But the rule goes beyond this. For the moment passing over the word “*severally*,” it says that all persons may be joined as plaintiffs in whom a right to relief is alleged to exist “*in the alternative.*”

Before the Judicature Acts neither at law nor equity was it permitted to several plaintiffs to come into Court, and in effect say, "some one or other of us is entitled to sue, if one of us is not, then the others are, or if the others are not, then the first mentioned is." This rule was rigorously enforced that every plaintiff suing must allege that he, in conjunction with the other plaintiffs, had a right of action against the defendant; and the effect of this in not a few cases was to produce considerable hardship. It not unfrequently happens in practice that it is a matter of the greatest doubt which one of two or three persons is entitled to sue on a particular contract or for a particular injury, although there is no doubt that the defendant is liable to some one or other of them. Take the case of a sale by an agent. There may very well arise a difficulty as to whether the agent or his principal should sue. It is certain the defendant is liable on the contract, but to whom? If he is not liable to the agent, he is to the principal, and *vice versa*, but not to both. Now in such a case the principal and agent could not have joined as plaintiffs in the same action, and setting out the facts claim relief alternatively, that is to say, if the principal shall be held not entitled to recover, that the agent might recover, or the converse. The only thing to be done was for one of the two to risk an action, when he was liable to be met with the defence that it was the other who was entitled to sue, and if this defence succeeded, then there was nothing for it but for the other to sue, when he in turn might be met with the defence that he was not entitled, but the plaintiff in the first action. And this result could very well be brought about, that for one matter you might have two actions and a different result in each on the same point.

The rule of the new practice under consideration was intended to remedy such a state of things, and in the case supposed to permit the agent and principal to sue together and claim relief alternatively. The case first supposed of the principal and agent suing together when there is a doubt as to which is entitled to sue, is only one of many cases where a like difficulty has arisen, and is likely to arise again. For instance, there is frequently a doubt as to whether the bailor or bailee of particular goods is entitled to sue for an injury to them; again, there may arise a difficulty as to whether a consignor or con-

"In the alternative."

Difference between former and present rule illustrated—principal and agent.

Bailor and bailee. Consignor and consignee, &c., &c.

signee of goods delivered to a carrier is the right party to sue : so whether the heir or a devisee should sue. The new rule meets this difficulty by in effect saying, "Join both or all the parties who seem to have a right to sue, and then you can claim that they are all entitled to recover, or you can claim that in the alternative if one does not succeed the other or others may, or you may claim that each plaintiff severally may obtain some relief," subject to this, that "the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge, in disposing of such costs, shall otherwise direct." R. S. C. Ord. XVI. r. 1.

"Severally."

So far there is no great difficulty in determining what the rights are which rule 1 of Order XVI. gives of joining plaintiffs ; but there is still a word in the rule the interpretation of which is by no means easy. "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, *severally*, or in the alternative." The question is, what enlarged powers of joining plaintiffs are conferred by the word "severally ?" One reading of the rule upon the point is, that it enables any number of plaintiffs to join together, and combine in the same action their several and distinct causes of action against a defendant or defendants ; and it must be admitted that this construction seems to be supported by high authority. In fact, this seems to be the considered judgment of the Court of Appeal in the case of *Booth v. Briscoe* (L. R. 2 Q. B. D. 496 ; 25 W. R. 838).

Booth v. Briscoe.

In this case the plaintiffs were the eight trustees of certain charities at Outwell, and they brought an action against the defendant, who was rector of Outwell, for a libel published by him in a newspaper, commenting on the improper management of the charities "by the trustees." At the trial the jury gave a verdict for the plaintiffs, with 40s. damages. The Queen's Bench refused a new trial, moved for on the ground that the verdict was against the weight of evidence, and the defendant appealed. No question was raised by the defendant's counsel either before the Queen's Bench or the Court of Appeal as to the right of the eight plaintiffs to sue together ; but during the argument in the latter Court, Bramwell, L.J., raised the difficulty himself, and the Court took time to consider the point.

Judgment was subsequently delivered by Bramwell, L.J., who, after remarking that the Court never had any doubt that the appeal ought to be dismissed on the questions raised by the defendant, went on, "The only remaining matter was a doubt I had suggested, whether these eight plaintiffs, if they had any cause of action, had not eight separate causes of action, and whether they could be joined as plaintiffs. I am still of opinion they had eight causes of action, and that they might have brought eight actions ; and the question is whether under the Judicature Act any difference has been made so that they can bring one action. Where a tort has been done, the tort is a separate tort to each man who complains. If, indeed, there were a joint tort, for instance, slander of several persons in partnership, the persons injured could have joined and maintained the action, but could have maintained it for the joint damage only. Here there is no joint damage. Each of the plaintiffs, if there is a libel, has been separately libelled. There is no doubt, therefore, that prior to the Judicature Act this proceeding would have been erroneous ; but it seems to us that under Order XVI. r. 1, these plaintiffs may well join as plaintiffs. Now it seems to me that the word 'severally' must comprehend the present case. I think, therefore, that they may very well join ;" and accordingly the appeal was dismissed.

Judgment
of Bram-
well, L.J.

If this decision applies beyond the facts of the particular case, it will, taken in conjunction with rule 4 of Order XVI., which permits all persons to be joined *as defendants* against whom the right to any relief is alleged to exist, "whether jointly, severally, or in the alternative," lead to some extraordinary results which it is difficult to think the framers of the rules contemplated. Rule 4 says all persons may be made defendants against whom the right to *any* relief is alleged to exist, &c., that is to say, the right to any relief is alleged to exist by any person who may be properly joined as a plaintiff ; and then rule 1, as interpreted by *Booth v. Briscoe*, declares that all persons may be properly joined as plaintiffs who choose to combine their separate grounds of claim in the same action. By this means you might have an indefinite number of plaintiffs, and if possible a still more indefinite number of defendants. Observe how this would work in

Comments
on.

Comments
on *Booth*
v. *Briscoe*.

Probable
limit to
application
of rule.

practice. Suppose, as in *Booth v. Briscoe*, there are eight plaintiffs. They have, it is true, eight causes of action against the same defendant ; but let us suppose that in addition each one of the eight has independent and totally different causes of action against a number of other persons. A., say, can sue Y. upon a bill of exchange and M. for breach of contract, B. can sue N. for assault and R. for a libel, C. can sue S. in trover, and so on. Can all these causes of action be joined together, and possibly thirty or a hundred different disputes be tried at the same time ? It is manifest that they cannot. Probably the rule only means that where two or more plaintiffs have some right to relief *in respect of a particular subject-matter*, but they are in doubt as to what their exact rights among themselves are, they may all join together as plaintiffs and claim that they are all entitled (*jointly*), or that each one has a separate right to relief (*severally*), or that, failing one of them, the other or others may get relief (*in the alternative*). There can be no doubt that the rule does go so far ; but it is submitted that it does not go beyond this. Of course rule 4 must be read in conjunction with rule 1, even with the limited construction put upon it as above ; but it is suggested that several plaintiffs cannot generally sue together in respect of distinct subject-matters of action, neither can several defendants be sued together in respect of distinct subject-matters ; and the result of the combined operation of rules 1 and 4 on the right of joining plaintiffs would then be, that where you have a given subject-matter of litigation, all persons can be joined as plaintiffs who are entitled to any kind of relief, joint, several, or in the alternative, against any defendant liable jointly, severally, or in the alternative on that particular subject-matter of litigation, but not otherwise.

And the few cases decided on the point since the first edition of this work was published would seem to bear out this view. Thus, in *Smith v. Richardson* (4 C. P. Div. 113 ; 48 L. J. C. P. 140 ; 27 W. R. 230 ; 40 L. T. 256), a joint claim was held embarrassing, and struck out under the following circumstances. S., the indorsee of a bill of exchange, sued the defendant as acceptor. The defendant having obtained leave to defend on an affidavit denying the acceptance, S. joined F., the drawer of the bill, as a co-plaintiff, and the

plaintiff delivered a statement of claim claiming on the bill, and also on goods alleged to have been the consideration given by F. for the bill.

The late Master of the Rolls had no doubt that if twenty people were hurt in a railway collision they could not combine to sue the railway company in one action. In the same case, *Appleton v. Chapellon's Paper Company* (45 L. J. Ch. 276), he decided that two owners of distinct properties could not be joined as plaintiffs in a writ to restrain a nuisance. In *Smith v. Richardson*, *supra*, the Court intimated that "Order XVI., dealing with parties, assumes an ascertained subject-matter. Order XVII. (now XVIII.), dealing with subject-matter, assumes ascertained parties. There must therefore either be identity of subject-matter, in which case Order XVI. gives ample liberty in the choice of parties, or identity of parties, in which case Order XVII. (now XVIII.) gives a like liberty in the choice of subject-matter."

One of several co-owners of a patent has a right to sue alone for the recovery of profits due for the use of the patent: *Sheehan v. Great Eastern Railway Company* (16 Ch. Div. 59), and an objection that other persons should have been joined as plaintiffs should be made promptly, and may not be postponed till the hearing, where no impediment exists to raising the objection at once: *Ibid.*

While on the subject of who may properly be joined as plaintiffs, attention should be called to rule 9 of Order XVI., which provides that "where there are numerous parties having the same interest in one action, one or more of such parties may sue . . . on behalf or for the benefit of all parties so interested;" and on this rule it has been held in *De Harte v. Stevenson* (L. R. 1 Q. B. D. 313; 45 L. J. Q. B. 575; 24 W. R. 367), that where the plaintiff sued on behalf of himself and the other owners of a ship for freight and dues for the ship, the Court would not on the application of the defendants order the other parties interested to be joined as plaintiffs in order that the defendants might gain the advantage of the other plaintiffs' liability for costs, although in a proper case it might order security to be given for costs.

Representative
plaintiffs.

If there is a member of the plaintiffs' class who dissents from the plaintiffs' course of action, he should be joined as a co-

defendant : *Wilson v. Church* (9 Ch. Div. 552 ; 39 L. T. 413 ; 26 W. R. 735 ; *Fraser v. Cooper*, 21 Ch. Div. 718).

Who may
be made
defend-
ants.

Coming next to the question, who may be joined as defendants in the same action, we start with rule 4 of Order XVI., to which attention has already been called. "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given against such one or more of the defendants as may be found liable according to their respective liabilities without any amendment." Rule 5 follows this rule, enlarges the power of joining defendants given by rule 4, and emphasises the change in the law made by it. "It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him ; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest." Rule 6, which follows on rule 5, does not seem to enlarge the powers given by rule 4. It says, "The plaintiff may at his option join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes." What is the effect of these three rules ? There have been several decisions which have made the meaning of the rules reasonably clear, so far at least as regards the liability of persons to be joined as defendants against whom relief is sought in the alternative.

*Honduras,
&c., Ry.
Co. v. Le-
fevre and
Tucker.*

The first case is the *Honduras Inter-Oceanic Railway Company v. Lefevre and Tucker* (L. R. 2 Ex. D. 301 ; 46 L. J. Ex. 391 ; 36 L. T. 46 ; 25 W. R. 310). The decision really turned upon rule 7 and rule 13 (now 11) of Order XVI., to be presently dealt with, but it is referred to here because some remarks of Cockburn, C.J., upon rule 4, for the time seemed to limit the generality of the powers given by that rule. The facts briefly were these :—Tucker, professing to act as Lefevre's agent, had contracted to take a certain number of debentures in the plaintiffs' company, which contract Lefevre had failed to perform, and the plaintiffs then brought their action against him claiming specific performance or damages. Subsequently

the plaintiffs obtained leave under Order XVI. r. 13 (now 11), to add Tucker as a defendant, and they amended their statement of claim, which then stood as a claim against Lefevre for specific performance or damages, or in the alternative if it should appear that Tucker had no authority to act as Lefevre's agent, then for specific performance and damages against Tucker. The defendant Tucker applied to have his name struck out of the record, and on appeal from the Divisional Court, which refused the application, the case came to the Court of Appeal. The decision of the Court was that the case came under rule 7, which empowers a plaintiff, when in doubt as to the person from whom he is entitled to relief, to apply to the Court to join two or more defendants to the intent that in such action the question as to which, if any, of the defendants is liable and to what extent, may be determined as between all parties to the action, and the appeal was accordingly dismissed. But, in giving judgment, Cockburn, C.J., said, "It is not necessary to decide whether the case falls within the 4th rule of Order XVI. My impression is that it does not, but that that rule is confined to cases in which a plaintiff has a right of action at his option against either of two parties, as, for instance, against a principal debtor and his surety." That the rule goes so far as suggested by the Lord Chief Justice there is no doubt; but the more recent case of *Child v. Stenning and Wagner* (L. R. 5 Chan. D. 695; 46 L. J. Ch. 523; 36 L. T. 426; 25 W. R. 519) in the Court of Appeal, decides that it goes much further.

Decision of
Court of
Appeal.

In that case the plaintiff Child had obtained a lease of a piece of land from the defendant Wagner. The other defendant, Stenning, trespassed on the piece of land in question, and to an action brought against him alone he pleaded that he had a right of way over the *locus in quo* granted to him by Wagner by a deed prior in date to the lease to Child. The plaintiff thereupon amended his writ, making for the first time Wagner a party to the action, and his claim then was for an injunction and damages against Stenning, or in the alternative damages against Wagner for breach of his covenant for quiet enjoyment. The defendant Wagner demurred to the claim thus stated, on the ground that the claim sought alternative and inconsistent relief against the defendants, and this demurrer was allowed by

Child v.
Stenning.

Hall, V.-C. The case came on appeal to the Court of Appeal, and the decision in the Court below was reversed.

Judgment
of the
Master of
the Rolls.

In giving judgment the Master of the Rolls said, "With all deference to the Vice-Chancellor, I am of opinion that the obvious meaning of the Rules is that the plaintiff was to bring the action in the form in which he has brought it. The plaintiff had obtained a lease of a piece of land from the defendant Wagner. The defendant Stenning claims to be tenant from year to year under Wagner of a certain right over part of the land. The plaintiff disputes the claim of Stenning under Wagner, and says that he is a mere trespasser, and that if he is a trespasser he is entitled to relief by injunction and damages for past injury; and he further says that if he is tenant under Wagner, he has incurred damage by Wagner's act, and he claims damages against him under his covenant for quiet enjoyment. He also says that it is more convenient to try both questions in one action, and so he will get a complete remedy either against Wagner or against Stenning, in which latter case he would have to pay Wagner's costs. On the other hand, if there were to be two actions, he might fail in both; for in the action against Stenning, Stenning might prove that he had a title under Wagner, and in the action against Wagner, Wagner might prove that he had no title, but was a mere trespasser. It appears to me that this was just the mischief that was provided against by the 3rd (now the 4th) rule of Order XVI. This is a case of alternative relief, and although in some cases a difficulty may arise by reason of there being different causes of action, that is provided for by the 1st rule of Order XVII., which is, that 'if it appears to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or a judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof' (see now Order XVIII. r. 9). But the present case appears to be one in which both claims ought to be tried together in the presence of both Wagner and Stenning."

It is submitted that the result of this judgment is not that different causes of action, in the sense of subject-matters of litigation, can be joined against different defendants in the same action; and for such a proposition there is no authority, unless

indeed *Booth v. Briscoe* be one. The result of the judgment is rather that where you have a given subject-matter of litigation you may join as defendants to an action brought with reference to it as many persons as you please, provided you can allege that you are entitled to some relief or the possibility of some relief, though only in the alternative, against each one of them ; and it makes no matter though in setting out your case against all these defendants you disclose different and inconsistent causes of action, in the sense of forms of action, against some of them. Cf. *Bagot v. Easton* (7 Ch. Div. 1 ; 47 L. J. Ch. 225 ; 37 L. T. 369 ; 26 W. R. 66).

The cases already quoted are authorities on the meaning of the clause in rule 4, "or in the alternative." There is no authority upon the meaning of the words "jointly, severally ;" but as already stated in other words, the meaning of rule 4 and its accessories, rules 5 and 6, taken along with rule 1, may be illustrated thus. Given a particular subject-matter of litigation and several plaintiffs who allege they have rights with reference to it, and several defendants who are alleged to be liable to them in this transaction ; in such a state of facts any one of the plaintiffs, or any number less than all, or all of the plaintiffs, can make any claim he or they has or have arising out of the given subject-matter of litigation against each individual defendant, or against all the defendants taken together, or against any one or more of them in the alternative.

2nd. *The right which a defendant has along with his defence to join new parties to the action.*—This right of a defendant is discussed further in another place (Chapter II., pages 80 to 82, *post*), to which the reader is referred.

Right of defendant limited to joining another as defendant to a counter-claim.

3rd. *The right which either party has during the progress of the action of applying to the Court for leave to add, substitute, or strike out parties, and the power of the Court to grant or refuse such application.*—Rule 11 of Order XVI. declares that "no action shall be defeated by reason of the misjoinder of parties ;" and provides for any necessary parties being added to the record. Upon the corresponding rule of 1875 it was held that a demurrer for want of parties will not lie. The proper course is to take out a summons, asking that persons named may be added as parties. (*Werderman v. Société Générale d'Électricité*,

Order XVI. r. 13.

Order XIX.
r. 11. 19 Ch. Div. 251.) No plea or defence is now pleaded in abatement. It is only the necessary consequence of these rules which make so considerable a change in the old law and practice on the subject that the largest power should be given to a judge or the Court of adding or substituting all necessary and striking out all unnecessary parties at any stage of the action, whether upon the application of either party, or at the instance of the Court itself. This, however, is not done on an *ex parte* application. (*Tildesley v. Harper*, 3 Ch. D. 277); or after final decree (see *Att.-Gen. v. Birmingham Corporation*, 15 Ch. D. 425).

Order XVI.
r. 2.
Power to
allow plain-
tiff to join
or substi-
tute an-
other as
plaintiff.

A reference to the rules in Order XVI. will show that more ample provision is made for a plaintiff applying to amend the parties to the action than for a defendant so applying, and a consideration of the cases decided upon the subject will show a greater disinclination on the part of the Court to add or strike out either plaintiffs or defendants at the instance of a defendant. (Cf. *Norris v. Beazley*, 2 C. P. D. 80; 46 L. J. C. P. 169; 35 L. T. 846; 25 W. R. 320.) Rule 2 of Order XVI. is the first of the rules to which attention should be called. It says, "where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just." This rule will frequently apply to a case where a plaintiff might under rule 1 in the first instance and without any order have joined along with himself as a plaintiff in the action, and claimed relief alternatively, the person whom he now seeks to add as a plaintiff. In such a case, if he finds out his error during the progress of the suit, he may apply under this rule to add the other necessary plaintiff; but then he must be prepared to show, first, that there was a *bonâ fide* mistake as to the issue of the writ, that is to say, that he then honestly thought that he could obtain the remedy sought without joining another plaintiff, and secondly, that the change sought is necessary for the determination of the real matter in dispute. (See *Smith v.*

Haseltine, W. N. 1875, 250, Part I.; 20 S. J. 140.) The Master of the Rolls has decided that there may be a *bonâ fide* mistake within the meaning of this rule as well with reference to a matter of law as to some matter of fact. (*Duckett v. Gover*, L. R. 6 Ch. D. 82; 46 L. J. Ch. 407; 25 W. R. 554); but according to the same authority the mistake must be a genuine, honest mistake. (*Clowes v. Hilliard*, L. R. 4 Ch. D. 413; 46 L. J. Ch. 271; 25 W. R. 224.) It may well be, however, that in cases where the Court would refuse to add a party as plaintiff under this rule they would do so under the more general powers given by rule 11. (See the remarks of Huddleston, B., in *Smith v. Haseltine*, *supra*.)

Decisions
on r. 2.

However, the distinction was not insisted on in *The Val de Travers Company v. London Tramways Company*, 48 L. J. C. P. 312; 40 L. T. 133. The circumstances of that case were as follows:—The plaintiffs contracted with a vestry to pave a public road with asphalt, and to keep the pavement in repair for fifteen years: the pavement when laid to be the property of the vestry. Shortly after the pavement was completed, the defendants, acting under statutory powers, laid down a tramway along the pavement, but so constructed and maintained their tramway as to occasion unnecessary damage to the pavement. It being doubtful whether an action commenced by the plaintiffs against the defendants on the above facts was brought in the name of the right plaintiffs, the Court, under Rules of Court, Order XVI. r. 2, ordered the vestry to be added or substituted as the plaintiffs, on the terms that the vestry was to be indemnified by the original plaintiffs for all costs and expenses.

Rule 7 enables the plaintiff to apply to add another defendant. "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the questions as to which if any of the defendants is liable, and to what extent, may be determined as between all parties." It has been decided in the case of the *Honduras Inter-Oceanic Company v. Lefevre* (L. R. 2 Ex. D. 301; 46 L. J. Ex. D. 391; 36 L. T. 46; 25 W. R. 310), the facts in which have been already sufficiently adverted to, that

Order XVI.
r. 7.
Plaintiff
joining
other de-
fendants.

Decisions
of Cock-
burn, C.J.
and Bram-
well, L.J.
as to appli-
cation of
r. 7.

where a plaintiff has a remedy against a principal if his agent acted with his authority or in the alternative a remedy against the agent if he exceeded his authority, it is a case within this rule. The majority of the Court guarded itself from saying that rule 4 would not have equally met the case, although Cockburn, C. J., expressed an opinion that it would not; but since the decision in *Child v. Stenning* there can be little doubt that rule 4 is wide enough to embrace such a case; and if that be so, the question arises in what way, if at all, does rule 7 enlarge the powers of joining defendants given by rule 3? This question is difficult to answer; but it has been more than once suggested that rule 7 applies mainly to the case where a plaintiff has at the commencement of the suit neglected to avail himself to the full of the powers given by rule 3, and finds out his error during the progress of the action. This view is supported by the authority of Cockburn, C. J., who in giving judgment in the *Honduras Inter-Oceanic Company v. Lefevre*, said, "This rule (rule 7) I think is applicable to actions which have been already commenced, as well as those in which the plaintiff is in doubt on commencing the action; and if, after having brought the action, the plaintiff is in doubt whether he has made the right person defendant, he may apply to the Court and obtain permission to add another defendant."

Order XVI.
r. 11.
General
power to
strike out
or add
plaintiffs or
defendants.

Passing on next to rule 11 we find it provided "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may at any stage of the proceedings, either upon or without the application of either party, and upon such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter be added." Then follows an exception to this rule which must be carefully noted. "No person shall be added as a plaintiff suing without a next friend

or as the next friend of a plaintiff under any disability without his own consent in writing thereto." Under the corresponding rule of 1875 it has been decided that the Court cannot substitute one plaintiff for another, except by the first plaintiff's consent, where he admits he commenced the action improperly, but in a proper case the Court will add a plaintiff, and give him the conduct of the action. (*Emden v. Carte*, 17 Ch. Div. 169.) Next comes a clause which, as will be seen further on, has been thought to limit the generality of the rule: "Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice." Rule 12, which follows, seems to be merely explanatory of rule 11. "Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner." Rule 13 is of a practical character, and provides for amending the writ and service of the same when new defendants are added.

It seems pretty clear that rule 11 is one framed rather in the interest of a plaintiff than of a defendant, and it will only be in a very exceptional case that a defendant can get any benefit from it. In the first place he cannot get a plaintiff joined who is unwilling to be joined. There is the proviso in the rule against him, "No person shall be added as plaintiff . . . without his own consent thereto." In *De Hart v. Stevenson* (L. R. 1 Q. B. D. 313; 45 L. J. Q. B. 575; 24 W. R. 367) the defendant applied under this rule to get co-owners of a ship joined as plaintiffs along with the then plaintiff, who was himself an owner, and the application was put on the ground that thereby the defendant would obtain additional security for his costs; but the application was refused: and see *Turquand v. Fearon*, 4 Q. B. D. 280; 48 L. J. Q. B. 341; 40 L. T. 191; 27 W. R. 396. Can he get another person joined as defendant along with himself? This question arose in *Norris v. Beazley* (L. R. 2 C. P. D. 80; 46 L. J. C. P. 169; 35 L. T. 846; 25 W. R. 320). The case was of this kind. Action on a bill of exchange of which the defendant was acceptor. The

Defendant
cannot get
a plaintiff
joined
without his
consent.

defendant pleaded that the bill was given in part payment for a ship bought by him, and that he contracted to purchase the ship on behalf of a company not then fully constituted, but which afterwards became so, called the Niger Merchants' Company, Limited, and that this company had a cause of action against the plaintiff for fraud, and that on that ground there was a good counter-claim by the company against the plaintiff. The defendant accordingly applied under rule 13 (now 11) to join the Niger Merchants' Company, Limited, as defendants, in order that the counter-claim might be set up. The company were willing to be joined, but the plaintiff opposed.

Where a defendant has been improperly made a party, the Court will order his name to be struck out under Order XVI. r. 11, although he may have delivered his statement of defence: *Fallance v. Birmingham Land Corporation* (2 Ch. D. 369; 24 W. R. 454).

When a plaintiff can get new parties joined under rule 11.

Next comes the question how far can a plaintiff avail himself of this rule for the purpose of joining either new plaintiffs or new defendants? In the first place it is obvious a plaintiff cannot get another joined as a co-plaintiff when that other is unwilling to be joined. The proviso to the rule is express upon the point; and besides there is the judgment of Mr. Justice Lindley in the case of *Cornack v. Grofrian and another* (W. N. 1876, 22). This was an action by a ship-owner against two consignees of goods for demurrage. A counter-claim had been delivered for damage to cargo. The plaintiff then took out a summons to add other parties as plaintiffs, on the ground that being co-owners of the ship with him they were jointly liable on the counter-claim; but his lordship, affirming the decision of the Master, refused to join the proposed parties as plaintiffs against their wish. Where, however, the proviso does not apply, there seems to be large power of joining new plaintiffs at the instance of a plaintiff. (See *Smith v. Haseltine*, *supra*.) But there is a limit to this power. It is questionable whether at the trial an amendment of the kind would be allowed unless the party proposed to be added were a merely formal party (*Williams v. Andrews*, W. N. 1875, 237); and when the trial is over, and the decision is against the plaintiffs, they cannot, by amendment under this rule or any rule, be allowed to introduce new plaintiffs and make an entirely new

case. (*New Westminster Brewery v. Hannah*, W. N. 1876, 215, and in the Court of Appeal, W. N. 1877, 35. *Att-Gen. v. Birmingham Corporation*, 15 Ch. D. 423.)

The principal case upon the right of a plaintiff to get another defendant joined under this rule is *Edward v. Lowther* (45 L. J. Q. B. 417; 34 L. T. 255; 24 W. R. 434), and here the Court laid down something like a general principle. The case was an action for libel, originally brought against the publisher of a newspaper. It transpired during the progress of the case, in answer to interrogatories, that one A. B. was sole proprietor of the paper. The plaintiff then applied to have A. B. joined as a defendant along with the original defendant. A. B. opposed. In giving judgment, Lord Coleridge, C. J., said: "I am of opinion that this application should be granted. I do not mean to say that the point would be free from argument if it rested on the terms of rule 13 (now 11) of Order XVI., but I place my judgment on this, that rules 3 and 13 (now 4 and 11) of the same order are to be read together. Now rule 3 (now 4) states that 'all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative.' It is plain therefore from that rule that the person whom it is now sought to make a defendant might have been made a defendant in the first instance. Then rule 13 (now 11) says 'that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined' may be added. I think that this means that a person may be added as a defendant who ought to have been such defendant for the purpose of general convenience and of doing justice in the subject-matter of the suit. Now as Mr. —, whom it is proposed to add as a defendant, is clearly a person against whom, if the plaintiff's case is right, relief may be sought, and who might have been made a defendant in the first instance, so I think he is one who may now be properly ordered to be joined as a defendant on such terms as the Court may think just."

*Edward v.
Lowther.*

Judgment
of Lord
Coleridge,
C.J.

So far attention has merely been called to the cases, where either the plaintiff or the defendant wants a party added. There is in the rule no express provision for third parties intervening and themselves applying to be made parties to the action for some purpose or other, unless indeed the case is

As to applications by third parties to be made plaintiffs or defendants.

embraced by the right which is reserved to the judge or the Court of amending the parties irrespective of the application of either side. "The Court or a judge may at any stage of the proceedings, either upon or *without* the application of either party," &c. There is one case in the books on the subject. *Mills v. Griffiths* (45 L. J. Q. B. 771) was an action of ejectment brought by a landlord against his tenant. At the hearing on appeal from Chambers, counsel representing a mortgagee of the defendant's interest claimed to be heard, and maintained that under Order XVI. r. 13, he might be made a party. Lush, J.: "The mortgagee is not a defendant. What *locus standi* does he have?" Cockburn, C. J.: "Why is the landlord to be in a worse position because his lessee has mortgaged?" Counsel urged that the Court might order that the landlord should hold subject to the mortgage; but the Court held that in the present action they could give no relief to the mortgagee, and that he could not be made a party.

Striking out parties.

As to the power given of *striking out* parties improperly joined, the defendant and the plaintiff have the very same right of applying to the Court; and it has been decided that a defendant improperly joined may be struck out on his own application though he has delivered a statement of defence. (*Vallance v. Birmingham Land Corporation*, L. R. 2 Ch. D. 369; 24 W. R. 454.)

Third parties.

By the new Rules of 1883, Order XVI. rr. 48—55, further provision is made for bringing in third parties against whom a defendant claims contribution or indemnity.

R. 48. Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the Court or a judge, issue a notice (hereinafter called the third party notice) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer, and served on such person according to the rules relating to the services of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a judge, be served within the time limited for delivering his defence. Such notice may be in the form, or to the effect of the Form No. 1, in Appendix B, with such variations as circumstances may require, and therewith shall

be served a copy of the statement of claim, then a copy of the writ of summons in the action.

R. 49. If a person not a party to the action, who is served, as mentioned in rule 48 (hereinafter called the third party), desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice. Provided always, that a person so served, and failing to appear within the said period of eight days, may apply to the Court or a judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or judge shall think fit.

Procedure
on bring-
ing in
third
parties.

R. 50. Where a third party makes default in entering an appearance in the action, in case the defendant giving the notice suffer judgment by default, he shall be entitled at any time after the satisfaction of the judgment against himself, or before such satisfaction by leave of the Court or a judge, to enter judgment against the third party to the extent of the contribution or indemnity claimed in the third party notice ; provided that it shall be lawful for the Court or a judge to set aside or vary such judgment upon such terms as may seem just.

R. 51. Where a third party makes default in entering an appearance in the action, in case the action is tried, and results in favour of the plaintiff, the judge who tries the action may at or after the trial enter such judgment as the nature of the case may require for the defendant giving the notice against the third party ; provided that execution thereof be not issued without leave of the judge until after satisfaction by such defendant of the verdict or judgment against him. And if the action is finally decided in the plaintiff's favour otherwise than by trial, the Court or a judge may, on application by motion or summons, as the case may be, order such judgment as the nature of the case may require to be entered for the defendant giving the notice against the third party at

any time after satisfaction by the defendant of the amount recovered by the plaintiff against him.

Directions
for trial.

R. 52. If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court or a judge for directions, and the Court or judge, upon the hearing of such application may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed in whole or in part, order the question of such liability as between the third party and the defendant giving the notice to be tried in such manner, at or after the trial of the action, as the Court or judge may direct : and if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.

R. 53. The Court or a judge upon the hearing of the application, mentioned in rule 52, may, if it shall appear desirable to do so, give the third party liberty to defend the action upon such terms as may be just, or to appear at the trial, and take such part therein as may be just, and generally may order such proceedings to be taken, or documents to be delivered, or amendments to be made, and give such directions as to the Court or judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action.

Costs.

R. 54. The Court or a judge may decide all questions of costs as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other, or others, or give such direction as to costs as the justice of the case may require.

Disputes
between co-
defendants.

R. 55. Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued, and the same procedure shall be adopted, for the determination of such questions between the defendants as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party, but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action.

As to the construction of rule 55, see *Furness v. Booth*, 4 Ch. Div. 586 ; 46 L. J. Ch. 112 ; 25 W. R. 267.

It seems to be probable that the Courts will lean against any construction of the rules which will delay a plaintiff. It would be intolerable that a plaintiff with a good case against the original defendant should be compelled to wait for his remedy while the defendants were fighting *inter se*. (*Treleaven v. Bray*, 1 Ch. Div. 176 ; 45 L. J. Ch. 114 ; 33 L. T. 827 ; 24 W. R. 198 ; *Bagot v. Easton*, 11 Ch. Div. 392 ; 27 W. R. 404 ; *Howell v. London Omnibus Company*, 2 Ex. Div. 355 ; 46 L. J. Ex. 700 ; 36 L. T. 637 ; 25 W. R. 610 ; *Associated House Company v. Whichcord*, 8 Ch. Div. 457 ; 47 L. J. Ch. 652 ; 38 L. T. 602 ; 26 W. R. 774.) Under the somewhat similar Rules of 1875 it was seldom found profitable in practice to bring in a third party.

CHAPTER II.

ON THE GENERAL PRINCIPLES AND RULES OF PLEADING.

Names of
pleadings
altered.

PRIOR to the Judicature Acts the number of pleadings in an action was almost unlimited—declaration, plea, replication, rejoinder, surrejoinder, rebutter, surrebutter, &c.; but now there are seldom more than three pleadings in one action, and there cannot be more than four without the leave of the Court. “No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a judge, and then shall be pleaded only upon such terms as the Court or a judge shall think fit.” Order XXIII. r. 2. The names given to the various pleadings are also altered,—Statement of Claim is substituted for declaration, Defence with or without Counter-claim for plea, Reply for replication, and finally Joinder of Issue; and in Orders XIX. to XXV. we have a new code of rules regulating the form of the modified system of pleading. Probably the most convenient way to present the subject to the reader will be to arrange the rules and decisions and comment upon them under the heads of the particular pleading to which they belong.

SECTION I.—STATEMENT OF CLAIM.

Writ some-
times state-
ment of
claim.

In certain circumstances the indorsement on the writ of summons amounts to a statement of claim. “When the writ is specially indorsed under Order III. r. 6, no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim.” (Order XX. r. 1a.)

The cases in which a plaintiff may, if he chooses, for he is under no compulsion in the matter, specially indorse his writ are :—

1. Where he is seeking to recover a *debt* or *liquidated demand* in *money* payable by the defendant with or without interest, or suing: (a), upon a contract express or implied (as for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or (b), upon a bond or contract under seal for payment of a liquidated amount of money; or (c), on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (d), on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (e), on a trust; or

When the writ may be a statement of claim.

2. Where, as landlord of a premises, the plaintiff claims possession against a tenant, or a person holding under a tenant, when the term has expired or been determined by notice.

The special indorsement on the writ of summons must be to the effect of such one of the Forms in Appendix C., section IV., of the Rules of 1883, as shall be applicable to the case (Order III. r. 6); and it is further provided by the next rule that whenever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, besides stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand and for costs respectively, and shall further state that upon payment thereof within four days after service, or in case of a writ not for service within the jurisdiction, within the time allowed for appearance, further proceedings will be stayed. Such statement must be made in the form in Appendix A., Part III., section III., of the Rules of 1883.

Special indorsement on the writ.

Where an indorsement or a writ is intended to do service for a statement of claim, great care will be requisite in framing it. Under the Rules of 1875, when a plaintiff claimed by indorsement on his writ of summons a sum of £399 9s. 7d. as "the defendant's share and contribution to payment of certain bills and promissory notes on which he and the plaintiff were jointly liable, and which bills and notes have been taken up by the plaintiff," it was held that the indorsement was not sufficient. (*Walker v. Hicks*, 3 Q. B. Div. 8; 47 L. J. Q. B. 27; 37 L. T. 529; 26 W. R. 113. See also *Yeatman v. Snow*, 42 L. T. 502.) And it is conceived that such an indorsement would still be insufficient. On the other hand where a plaintiff specially indorsed his writ: "The plaintiff's claim is for

What amounts to.

Special indorsement on writ. £49 5s. 8d. The following are the particulars :—‘1879, Feb. 14, To goods, 16s. 1d.’” Several similar items followed, and the list ended with: “May 21, British Commercial Bank Draft returned, £20; Notary charges on same, 1s. 6d., making in all a total of £99 0s. 8d.” Credit was given on the indorsement for £20, the amount of the draft returned, and also for certain other sums, leaving a balance of £49 5s. 8d. due. Objection was taken that the indorsement did not state the nature of the goods, nor whether they were goods sold, or converted, or detained, but it was held by the Court of Appeal that the indorsement was sufficient. (*Smith v. Wilson*, 4 C. P. Div. 392; App. 5 C. P. D. 25; 49 L. J. C. P. 96; 41 L. T. 433; 28 W. R. 57.) No doubt this ruling still holds.

What amounts to.

Demurrers are abolished, and a defendant who is dissatisfied with the sufficiency in law of the averments on the indorsement cannot now, as he might in some cases under the Rules of 1875 (*Robertson v. Howard*, 3 C. P. D. 280; 47 L. J. C. P. 480; 38 L. T. 715; 26 W. R. 683; *Fawcus v. Charlton*, 10 Q. B. D. 516), treating the indorsement as a statement of claim, demur to it. The proper remedy of the defendant is either to apply under Order XIX. r. 7, for a “further and better statement of the nature of the claim,” or, under Order XXV. r. 2, by his defence, specifically to raise any point of law he desires to take.

If the plaintiff wishes to fix the venue at any place other than Middlesex, he should, when the writ is intended to be the statement of claim, specify the place in question upon it exactly in the same manner as upon a statement of claim (Order XX. r. 5); and it would seem the writ should bear the signature of counsel if it has been settled by counsel.

Plaintiff may unite several causes of action in his claim.

Coming next to the form of the statement of claim, when one is prepared and delivered, there are two general observations to be made. First, a plaintiff, as a rule, can unite in the same action several causes of action, subject to the power of the Court to order them to be tried separately, when they cannot be conveniently tried together (Order XVIII. r. 1). And it follows when several actions are united in this manner that the statement of claim must contain all the averments essential to each cause of action. The rule we have stated is subject to the following exceptions :—

1st. No cause of action, unless by leave of the Court or a judge, can be joined with an action for the recovery of land, except: (a) claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed or any part thereof; (b) damages for breach of any contract under which the same or any part thereof are held; or (c) damages for any wrong or injury to the premises claimed. (Order XVIII. r. 2.) There was a similar provision in the Rules of 1875, and upon it it was held that an action "to establish title to land," not claiming possession, was not an action for the recovery of land so as to require the leave of the Court for its joinder with any other cause of action. (*Gledhill v. Hunter*, 14 Ch. Div. 492; 49 L. J. Ch. 333; 28 W. R. 530; not following *Whetstone v. Dewis*, 1 Ch. Div. 99; 45 L. J. Ch. 49; 33 L. T. 501; 24 W. R. 93.) Neither is a foreclosure action an action for the recovery of land within this rule. (*Tavell v. Slate Company*, 3 Ch. Div. 629.) It was also laid down that an application to join another cause of action with one for the recovery of land should be made before the issue of the writ. (*Pilcher v. Hinds*, 11 Ch. Div. 905; 48 L. J. Ch. 587; 40 L. T. 832; 27 W. R. 389); and that leave ought to be given to join with an action for the recovery of land an action for the recovery or delivery up of a deed relating to the land, and also for the recovery of personal estate comprised in the same instrument. (*Cook v. Enchmarch*, 2 Ch. Div. 111; 45 L. J. Ch. 504; 24 W. R. 293.)

Exceptions to rule that plaintiff may unite causes of action in his claim.

2nd. The second class of exceptions to the rule, that different causes of action may be joined together, is that claims by a trustee in bankruptcy as such shall not, unless by leave of the Court or a judge, be joined with any claim by him in any other capacity (Order XVIII. r. 3), and that claims by or against an executor or administrator as such may only be joined with claims by or against him personally when the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator. (Order XVIII. r. 5.)

It must also be remembered that several persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist jointly, severally, or in the alternative (Order XVI. r. 1), and that by rule 4 all persons may be joined as defendants against whom the right to any relief is alleged to exist,

Plaintiffs may claim jointly, severally, or alternatively.

whether jointly, severally, or in the alternative. In any one of these cases it is obvious that the statement of claim will be complicated by the necessity of setting out facts in the alternative to found the alternative application for relief.

Claim not limited by the writ.

The second general observation we have to make is, that the pleader in settling a statement of claim is not necessarily limited to the relief claimed in the writ. "Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ." (Order XX. r. 4.)

Brevity the first rule of pleading.

In preparing a pleading, the point insisted upon in all the rules is *brevity*, and either party guilty of any prolixity may be saddled with the costs occasioned by his prolixity, either at the instance of the opposing party or upon the independent action of the taxing officer. Order XIX. r. 2, provides for the delivery of a statement of claim, defence, counterclaim, or reply, and then proceeds, "such statements shall be *as brief as the nature of the case will admit*, and the taxing officer in adjusting the costs of the action shall at the instance of any party, *or without any request*, inquire into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same." And by rule 4 "every pleading shall contain, and contain only, a statement *in a summary form*, of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall when necessary be divided into paragraphs numbered consecutively." Further, by rule 5 it is declared that the forms given in the Appendices, "when applicable, and when they are not applicable forms of the like character, as near as may be, shall be used for all pleadings, and where such forms are applicable and sufficient any longer forms shall be deemed prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same, as the case may be."

Consequences of prolixity.

Very similar provisions were contained in the Rules of 1875 on the subject of prolixity, with this difference, that under them the taxing officer had no express power of his own motion to visit the party chargeable with prolixity with the costs occasioned thereby. It is obvious that one of the first cares of the pleader must be to consult brevity in his statement of his claim

or defence ; but at the same time he must not sacrifice accuracy and fulness of statement where they are necessary. He is bound to state *all the material facts* on which he relies, and if in his pursuit of brevity he omits to do so, he is liable to have his whole action or defence defeated, or, in the most favourable view, be allowed to amend upon onerous terms as to costs. It is true demurrers are abolished, and by Order XIX. r. 26, no technical objection shall be raised to any pleading on the ground of any alleged want of form ; but by the following rule—r. 27—there is power at any stage of the proceedings to strike out of a pleading any matter which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay “the fair trial of the action ;” and by Order XXV. a procedure, to be presently mentioned, in substitution of demurrers is created.

But pleader must state material facts.

The rule the pleader must place before him is *brevity, but only so far as brevity is consistent with the statement of every material fact upon which he relies.*

Under the corresponding rule in the Rules of 1875 the question, what “material facts” must be pleaded came under discussion in a number of cases ; and as Order XIX. r. 4 of the Rules of 1883 is, in substance, the same as Order XIX. r. 4, of the Rules of 1875, though the injunctions as to brevity are more urgent, it is important to consider in some detail the facts of those cases, and the judgments given :—

What are material facts.

Phillips v. Phillips (4 Q. B. Div. 12 ; 48 L. J. Q. B. 135 ; 39 L. T. 556 ; 27 W. R. 436), was an action for the recovery of land, in which the plaintiff delivered the following statement of claim :—

“1. The plaintiff is a baronet and heir male of the body of Sir T. Phillips, of Picton Castle, who was living in the year 1513. The plaintiff is also heir male of the body of Sir J. Phillips, of Picton Castle, who died in or about the year 1629. The plaintiff is also heir-at-law of Sir E. Phillips, of Picton Castle, who died in or about the year 1697. 2. The plaintiff is also the heir-at-law of the first Lord Milford, who died in or about the year 1823, there being no legitimate descendants now living of Bulkeley Phillips, the uncle of the said Lord Milford. 3. The plaintiff is also the eldest son of the late Sir James Evans Phillips, Bart., who

What are
material
facts.

*Phillips v.
Phillips.*

died in 1873, and whose residuary estate, on his death, became and was vested in the plaintiff by the last will and testament of the said Sir James Evans Phillips. 4. The plaintiff says that under or by virtue of certain deeds, assurances, wills, and documents in the possession and control of the defendants, the plaintiff is entitled to the possession of the said premises and hereditaments claimed herein in the plaintiff's writs as such heir male, heir-at-law, and residuary devisee, or as being the person entitled to the baronetcy now held by the plaintiff. 5. In the alternative, the plaintiff alleges that the said Sir Thomas Phillips, Sir John Phillips, Sir Erasmus Phillips, Lord Milford, and Sir James Evans Phillips were, at the times of their respective deaths, seised in fee of the said premises and hereditaments. 6. The plaintiff in the alternative alleges that he is entitled to possession of the said premises and hereditaments, or some of them, under divers Crown grants which are in the possession and control of the defendants. 7. The defendants are, and lately have been, in possession of the said premises and hereditaments, and have received the profits thereof, but refuse to give the plaintiff possession of the said premises and hereditaments, and to pay over or account for the profits."

A summons was taken out to strike out the whole statement of claim as embarrassing, and finally the case came on appeal to the Court of Appeal. The unanimous judgment of the Court was that the statement of claim was embarrassing, because the plaintiff had failed to set out the material facts on which he relied.

Judgment
of Brett,
L. J.

Lord Justice Brett, in giving judgment, said: "I am of opinion that this pleading is embarrassing within the rule, and therefore it ought to be set aside. I think it is embarrassing because, by a general statement, the plaintiff has prevented the defendants from demurring, and at the same time has omitted to state the facts which he ought to have stated, and the facts on which he will have to rely at the trial if he has any case. If the only defect in the pleading was that it was demurrable, I should not, on that ground, have thought it embarrassing, but the embarrassment consists in putting in a general statement which prevents a demurrer, and at the same time leaving out the particular facts which would

give the defendants the knowledge of what the plaintiff's case is.

What are
material
facts.

"One thing seems clear that, in an action for the recovery of possession of land, the statement of claim is subject to the same rules as every other statement of claim. It seems to me that rule 15 of Order XIX. shows that. I think it quite clear that the present statement is wholly insufficient. I will not say that it is easy to express in words what are the facts which must be stated, and what matters need not be stated. I know that great pains were taken to draw Rule 4, and it is difficult to state the matter more clearly than in that rule. The distinction is there pointed out that every pleading shall contain a statement of the material facts on which the party pleading relies, but not the evidence by which they (that is, those material facts,) are to be proved. The distinction is taken in the very rule itself between the facts on which the party relies, and the evidence to prove those facts. Erle, C. J., expressed it in this way. He said there were facts that might be called the *allegata probanda*, the facts which ought to be proved, and they were different from the evidence which was adduced to prove those facts. And it was upon that expression of opinion of Erle, C. J., that Rule 4 was drawn. The facts which ought to be stated are the material facts on which the party pleading relies. It was purposely not put, 'the facts which will be necessary to support the cause of action;' for the party might not be able to state such facts; as, for instance, he might only know such facts as would render his case demurrable, and could only state facts which would not be sufficient to maintain the cause of action; but he states the facts on which he intends to rely at the trial.

*Phillips v.
Phillips.*

Judgment
of Brett,
L. J.

"There are some tests which show practically what the rules mean. I think that in a pleading under the new rules such facts ought to be stated which if a person had to state a special case formerly for the opinion of the Court, he would have stated in the special case as facts. If a person had to state a special case as an arbitrator, there are certain facts which he must find and state, but he does not state the evidence upon which he was brought to find those facts; and the difference, although not so easy to express, is perfectly easy to understand.

"An arbitrator had to state every fact which would support,

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when proved, the contention of the person on whose behalf he was stating that fact. He did not state the evidence by which he came to find those facts. Now such facts as would be stated in a special case to support or meet the claim are precisely the facts which are to be stated under the new system. It seems to me that there is another test. If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings. Therefore again, in their pleadings they ought to state every fact upon which they must rely to make out their right or claim.

*Phillips v.
Phillips.*

"It seems to me there is considerable difficulty where a pedigree is brought into a statement of claim, and I am not prepared to state that in my view in all cases a pedigree must be set out. I cannot help thinking that sometimes a pedigree would have to be set out, or parts of it, or facts in it, but that sometimes the pedigree would only be evidence of the facts which have to be proved. The only way in which I can state my view is to say this: Where the facts in a pedigree are facts to be relied upon as facts to establish the right or title, they must be set out; but where the pedigree is the means of proving the facts relied on as facts by which the right or title is to be established, then the pedigree is evidence that need not be set out."

Judgment
of Cotton,
L.J.

Cotton, L. J., in the course of his judgment, said:—"What do the rules and orders tell us about the form of pleading in such a case? It is obvious there is no different form, no different principle applicable to a statement of claim in an action to recover land. First of all I would refer to the Order III. r. 1. The first mention of what is ultimately developed as a statement of claim comes in the form of the indorsement of a writ, and there we have the statement of claim not referred to as such, but referred to in this way: 'The indorsement of claim shall be made on every writ of summons before it is issued.' Then the second rule is: 'In the indorsement required by Order III. r. 1 (which I have just read) it shall not be essential to set forth the precise ground of the complaint, or the precise remedy or relief to which the plaintiff considers himself entitled.' Then afterwards we come to Order

XIX. r. 2, which enables the defendant, if he requires to know the precise ground of complaint, to require a statement of claim to be put in. Therefore we have this, that the statement of claim is to state the precise ground of complaint. But when we come to Order XIX. r. 4, which requires that the material facts on which the party pleading relies should be stated, and we have a further guide as to what are the material facts to be so stated by rule 18, Order XIX., which requires that the party in pleading must raise all such grounds of defence or reply, as the case may be, as, if not raised on the pleadings, would be likely to take the opposite party by surprise. The plaintiff must state the facts which are material for the purpose of enabling the defendant to go to trial, knowing what issue he really has to meet, and what is the question between him and the plaintiff, so that he may not be there taken by surprise, and the real question between the parties fail to be decided in consequence of insufficient allegations of the plaintiff.

What are material facts.

Phillips v. Phillips.

“The statement of claim, of necessity, must set out all the facts material to prevent the defendant being taken by surprise, because it is the first pleading, and that which ought to be referred to for the purpose of seeing whether there is a cause of action.”

So in *O'Connor v. O'Hara* (8 L. R. Ir. 249), where in an action for the recovery of land a statement of claim simply alleged that the plaintiff was wrongfully dispossessed of his lands by the defendant, who forcibly entered thereon, and was then in possession, the Exchequer Division in Ireland struck out the statement of claim as inadequate, on the ground that in an action for the recovery of land the statement of claim must state such facts as, if true, would show the plaintiff has an interest in the land, entitling him to recover, whether that interest is one in fee, or for lives, or for a term of years. On the other hand, where an assignee of the reversion sues the lessee in ejectment for non-payment of rent, it is sufficient for the plaintiff to aver in his claim generally that the estate of the lessor vested in him without stating the intermediate devolutions of title. (*Musgrave v. Walsh*, 6 L. R. Ir. 335.)

O'Connor v. O'Hara.

In *Evelyn v. Evelyn* (42 L. T. N. S. 248 ; 28 W. R. 531), where the statement of claim in an action for the recovery of

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land, after alleging facts which would show a title in Frances Evelyn, contained a statement that "the said Frances Evelyn died intestate as to real estate, and leaving Sir H. Evelyn her heir-at-law," and then stated facts which showed a title in the plaintiff to Sir H. Evelyn's estate, it was held by Malins, V.-C., that the plaintiff had sufficiently pleaded his title.

In *Turquand and the Capital Counties Bank v. Fearon* (48 L. J. Q. B. 708), the Court of Appeal, without giving any decision on the point, intimated that whenever in any pleading an agreement is alleged, it is not sufficient generally to aver the existence of an agreement, and to state its effect; but the pleading should state whether the agreement relied on is in writing or parol, or the result of a series of documents.

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"In my judgment," said Bramwell, L. J., "the claim ought to have specified that the agreement was in writing, if the written agreement was relied upon, and the effect of the writing should have been set out; and I think that the claim was embarrassing from this not having been done. I cannot help thinking that the intention of the rules was that in the pleadings themselves a special case should be evolved so as to save the trouble and expense of pleading first and then after all having to state a special case. For this purpose the actual facts of the case ought to be stated. It is idle for any one to suppose that a party can, by this system of burying his head in the sand, escape detection when he has no case, though he may possibly manage to scrape along to one step further in the action."

Thesiger, L. J., agreed that the claim was embarrassing. "It alleges," he said, "that it was agreed between the plaintiff and the defendant that certain things should happen. Looking at Order XIX. r. 4, it seems to me clear that, in the contemplation of the Legislature, such a statement ought not to be made. Where the plaintiff relies on an agreement it is for him to state whether it was an agreement in writing or by parol, or partly by parol or partly by letter, or whether it is the result of a series of documents. That is quite clear when we look at Order XIX. r. 4. An agreement is not a fact, but an inference which the law draws from facts. The real fact is the existence of a document in writing, or that certain letters were written, or that a certain conversation took place. The matter

is made more plain when we look at Order XIX. r. 24, which is as follows: 'Wherever the contents of any document are material it shall be sufficient in any pleading to state the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.' The reasonable inference from that is, that whereas as a rule material documents are to be set out and set out as a whole, in some cases where parts of the document may be immaterial, the immaterial part used need not be set out. The same thing follows from the words of rule 27, which lays down that where a contract is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract as a fact, and to refer generally to such letters, conversations, or circumstances, without setting them out in detail. What is the obvious inference? Again, that where a written agreement or document is relied on, the fact that it is an agreement in writing or a document must be set out, but as such documents are sometimes voluminous, only the effect and not the words in full need be given. To meet the difficulty raised that the plaintiff cannot always tell whether the writing amounts to a complete agreement or whether the agreement must be proved *aliunde*, the plaintiff may set up his claim in the alternative. The result is that it is not as a rule necessary to set out the agreement verbatim, but it is necessary to state whether the agreement is in writing or by parol, and if it was in writing to set it out so far as to show the effect of it."

How an agreement should be alleged.

Harris v. Jenkins, 22 Ch. Div. 481; 31 W. R. 137, was a case where the plaintiff by his statement of claim alleged that he was the owner in fee of two farms in Breconshire called F. and G., and that they were connected by a road which ran through a farm called G., of which farm the defendant was the owner in fee, and which lay between the plaintiff's two farms. The statement of claim in the 4th paragraph went on: "the plaintiff and his tenants, occupiers of F. farm, are entitled to a right of foot, horse, and carriage way along the said road, through and over the defendant's farm;" and the 5th paragraph proceeded: "the plaintiff and his tenants, occupiers of G. farm, are also entitled to a like right of way along the said road through and over the defendant's farm." The statement

Pleading prescriptive rights.

How prescriptive rights should be pleaded.

of claim then alleged that the defendant had recently obstructed the road, and claimed an injunction and damages.

The defendant took out a summons, asking that the statement of claim might be struck out as tending to embarrass or delay the fair trial of the action, or, in the alternative, that the statement of claim might be amended by the plaintiff in such a manner as to show the route and terminations of the road mentioned in paragraph 3 of the statement of claim, and the mode in which the rights of way claimed in the 4th and 5th paragraphs were claimed, and the origin, constitution, nature, and extent thereof.

The plaintiff's title must be stated.

Fry, J. held that the statement of claim was insufficient, and, in giving judgment, he observed: "In my judgment this statement of claim is embarrassing. The right of way, to which the plaintiff alleges that he is entitled, might be the result either of a grant or of prescriptive user, and it is very desirable that, before the trial of the action, the defendant should know by which title the plaintiff claims the right, otherwise the defendant might be seriously embarrassed. He might come to the trial with witnesses prepared to prove that the user of the way had been for less than the legal period of prescription, that it had been a user claim, or by permission, and then he might find that the plaintiff claimed the right under a grant. I think the defendant is entitled to a short statement by the plaintiff of the title by which he claims. The right is a legal conclusion from certain facts, and those facts ought to be shortly stated in the pleading. I think also that the plaintiff ought to show, with reasonable precision and exactitude, the termini of the right of way and the course which it takes. It may be sufficient to state the names of the closes of land through which it passes, or to refer to their numbers on the tithe commutation map of the parish. The summons must be allowed with costs."

Also the termini of the way.

The case of *Millington v. Loring* (6 Q. B. D. 190; 48 L. T. 657; 50 L. J. Q. B. 214; 29 W. R. 207) is an authority to show that the plaintiff ought to set out in his claim not only every material fact which is a link in his title to redress, but every material fact which shows how he has been affected by the alleged wrongful conduct of the defendant. It establishes, also, that there are facts which it is now proper to state in a

pleading which it would not have been proper to state in a pleading prior to the Judicature Acts. In *Millington v. Loring* the plaintiff sued for breach of promise of marriage, and in the statement of claim, after alleging a promise to marry, went on (paragraph 4): "The plaintiff, relying on the said agreement, permitted the defendant to debauch and carnally know her, whereby the defendant infected the plaintiff with a venereal disease." An application was made at Chambers to strike out this paragraph, as merely pleading evidence, and the case came on appeal to the Court of Appeal.

What are material facts.

The Court held unanimously that the averments in paragraph 4 were material facts which ought properly to be pleaded. In giving judgment Lord Selborne, L. C., said: "The first question is whether the matters alleged in the fourth paragraph of the statement of claim can be properly pleaded under Order XIX. rule 4. Order XIX. rule 4 is this: 'Every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved.' The matters pleaded here are concisely stated and there is not a statement of the evidence by which the cause of action is to be proved, either as regards the promise or the breach. If the words of the rule are to be construed as confined to facts material to the cause of action, as distinct from the consequences in the action of that cause, I think the appellants' contention would be right. But the words of the rule seem studiously to omit such a limitation, and if the facts mentioned in the rule are facts material to anything which the plaintiff must prove by evidence, then I think the matters in question here are not excluded, but rather permitted by the rule. Is not the plaintiff to prove at the trial both the facts constituting his cause of action, and the consequences to him arising from that cause of action for which he seeks to recover damages? In other words, are not the facts in question here material to show how the plaintiff has been affected by the cause of action? That they are so seems manifest from the fact that they may be given in evidence at the trial. Nothing irrelevant or immaterial can be given in evidence, and that these matters might be given in evidence is manifest from the judgment in *Berry v. Da Costa*, L. R. 1 C. P. 331; 35 L. J., C. P. 191.

Facts material to anything a party must prove should be pleaded.

What facts
are ma-
terial.

“It is perhaps not necessary to go further than this; but, going further, and looking at Order XXVII. r. 1, we must see whether any of the grounds mentioned there for striking out averments in pleading apply to this case.” [His Lordship here read the rule.] “The allegations here would be certainly scandalous if they were irrelevant; but nothing can be better settled than that, if relevant allegations cannot be struck out as scandalous. Then are the allegations embarrassing? It is suggested that the jury, at the trial, may suppose that what is alleged is alleged as a distinct cause of action. I think the

Millington
v. Loring.

jury are not likely to apply their minds to the pleadings in any technical way whatever. They listen to pleadings only to hear the facts and take the law from the judge. They cannot be prejudiced by hearing the facts from the pleadings any more than from hearing them (as they certainly would do) from the lips of counsel in opening the case. It is said that embarrassment may arise from the necessity of the defendants taking distinct issue upon these matters. I can hardly follow the meaning of that argument. If the statement of claim is divided into a number of different paragraphs, alleging different facts for different material purposes, the defendant may admit, deny, or leave them alone as he thinks fit. He is in no danger if he fairly says whether he admits or denies these matters, but is in just the same position as if they were given in evidence without being stated in the pleadings. But

Judgment
of the Lord
Chancellor.

there is one difference which results from their being put into the pleadings, and that difference, as it seems to me, does not tell against the defendant, but in his favour. It is this: the defendant is not taken by surprise; he knows the sort of case he has to meet, and he will not leave the case undefended if he thinks these matters are material as affecting the damages the jury may give against him. If what is alleged here really happened, of course the defendant would not be taken by surprise. If it did not, nothing could take him more by surprise than to go to trial and have to meet those allegations, as to which he had had no notice that they were to be part of the case against him. Substantially it is in justice to the defendant that these matters appear in the pleadings, and that consideration tells in favour of keeping them there. As to the latter and most disagreeable part of the 4th paragraph

I have had some doubt whether there is not a difference with regard to it, but I think substantially it stands upon the same footing as the other part.” What facts are material.

Brett, L. J., said, “We have to consider first, whether, since the Judicature Acts, these facts can be properly pleaded. It is clear that they could not before the Judicature Acts. They are facts which went to increase the damages, and were not pertinent to the cause of action, which could be as well made out whether they were pleaded or not. The question is whether such facts under Order XIX. r. 4, may be properly pleaded, not being material to the cause of action with respect to the defence in the action, but being material to the question of damages. In my opinion they may be pleaded now, though they could not before the Judicature Acts. Rule 4 says that the statement must be of the material facts on which the party relies, not facts on which the party relies material to the issue. The plaintiff here relies on the facts alleged in paragraph 4; therefore they are properly pleaded, though not necessary to the liability of the defendant. It is said that the defendant is put into a difficulty as to traversing or admitting them. But he is not bound to traverse them. Though they are properly stated in the claim, yet, inasmuch as they are not facts material to the cause of action, the mere fact of not traversing them would not be an admission of them. Therefore he is not called upon to traverse them, though I do not see how he would be injured if he were. If they were not properly pleaded under rule 4 of Order XIX. I think the defendant would fail in showing that the Court ought to strike them out upon any of the grounds mentioned in rule 1, Order XXVII. They cannot be struck out unless brought within that rule, even if they are not properly pleaded under rule 4 of Order XIX. If they are to be struck out it must be by reason of their being scandalous, or tending to prejudice or embarrass the fair trial of the action. I have already stated that they may be properly given in evidence at the trial. It seems to me that the mere fact of stating them in the pleadings cannot tend to embarrass or prejudice the fair trial of the action; on the contrary, they are necessary for the fair trial of the action. I am clearly of opinion that these matters could be properly pleaded within rule 4 of Order XIX., and that if improperly pleaded, they cannot be

Judgment of Brett, L. J.
Facts may be pleaded, though not necessary to defendant's liability.

struck out as being within the grounds stated in rule 1 of Order XXVII."

Every essential fact must be stated, but in summary form.

It seems clear from these cases that a plaintiff must *state* every material fact which it is essential for him to prove in order to obtain the relief he seeks. It is not enough for him to say he has such or such right, or that the defendant is under this or that liability to him. He must show by a consecutive, though brief and summary, statement of the facts on which he relies how his title to relief arises, and how the defendant comes under any liability to him. And where he is claiming special damage as the result of the defendant's wrongful act, he must go on as a fact to allege that he has suffered the particular consequence of the defendant's act on which he relies. It must be borne in mind that the whole object of pleading is to enable each side to come to trial prepared to meet the case of the other, and the plaintiff in his statement of claim is bound to state his title to relief with such particularity as will inform the defendant of the character of the facts he has to contend against. The remarks of several judges in the cases quoted, that everything should be stated which would properly appear in a special case, must be taken as subject to this, that the rules contemplate the compression of the facts into a more summary form than is usual in the statement of a special case.

Rules designed to secure brevity.

But while a plaintiff is thus bound to set out all the material facts which are essential to his claim, the rules provide that he shall *only* set out these facts; and even in setting them out, employ the fewest words and the most summary method consistent with intelligible statement. The rules which have been framed with this object must next be considered.

Evidence must not be pleaded.

1. "Every pleading shall contain. . . a statement . . . of the material facts . . . *but not the evidence by which they are to be proved.*" (Order XIX. r. 4.) This rule, forbidding the pleading of evidence, is one of the greatest importance. There was an exactly similar provision in the Rules of 1875, the neglect of which, however, did no little to bring the system into disrepute, and lead to further changes.

It is sometimes a matter of the greatest difficulty to say

whether or no a particular fact is a material fact, and therefore pleadable, or merely evidence of a material fact, and on that ground inadmissible ; but the majority of cases admit of no difficulty. A plaintiff is averring that he was injured by the negligence of another. It would be pleading evidence to aver that A. B. was standing by and saw the occurrence. Again, a plaintiff is alleging that he gave a certain notice to another. It is merely evidence to state that he sent the notice in a letter which he gave to A. B. to post, and which A. B. did post ; and so on in an infinite number of cases.

Evidence must not be pleaded.

In *Jones v. Turner* (W. N. 1875, 239), where the plaintiff in an action for commission set out in his claim admissions of liability which the defendant had made to him, Quain, J., at Chambers, struck out the paragraphs in question, on the ground that they contained evidence of material facts, and not facts themselves. To the same effect is *Askew v. The North Eastern Railway Company* (W. N. 1875, 238), where in an action for interference with the plaintiff's right to carry coals over a quay, one paragraph of the statement of claim was as follows : "The defendants do not dispute, but have in their correspondence with the plaintiff's solicitors admitted, that the plaintiff and his tenants are entitled to have access from the Redhough estate to the quay for the carriage, storage, and shipment of manure, dung, and goods of a like description, and have expressed their willingness to make the necessary arrangements, and to give all facilities for that purpose." Application was made to have this paragraph struck out ; and Quain, J., in giving his decision, said : "This paragraph must be struck out. Can you point out even in the forms any precedent for such a paragraph as this ? Can you point out any section in the Act that enables you to plead admissions made by the other side to your solicitors ? You put the defendants in the difficulty of not knowing whether to traverse the admission. Conciseness is intended by these rules to be the very soul of pleading." (See also *Davy v. Garrett*, 7 Ch. D. 473 ; 47 L. J. Ch. 218 ; 38 L. T. 77 ; 26 W. R. 225.) So where in an action for malicious prosecution the plaintiff set out the facts in detail, with the view of stating in the face of his claim that there was no reasonable or probable cause for the prosecution, and among other things stated that he denied

Instances of pleading evidence.

the charge of theft when it was made against him, Archibald, J., at Chambers, affirmed the order of the Master striking out the claim. (*Aderis v. Thrigley*, W. N. 1876, 56.)

Rules to
secure
brevity.

2. Another rule, having for its object brevity and conciseness of statement, is that the effect only, and not the whole of documents should be set out in a pleading unless the precise words are material. "Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material." (Order XIX. r. 21.) It should be noted that the terms of this rule are not imperative. It is not declared that documents *must* be summarized, but that they should be; and the effect of setting them out at improper length is that the pleading may be objected to as prolix, and the party visited with costs. A reference to the forms, given in the Appendix, shows that a very large compliance with this rule is expected. In the various claims upon written documents, like charterparties, policies of insurance, bonds, contracts of sale, leases, &c., the documents in question are invariably summarized, and their effect as it bears upon the claim alone given; and no doubt in the great majority of cases this will be a sufficient and a proper statement. To set out a long document containing clauses irrelevant to the matter in dispute will unquestionably be a grave departure from the spirit and intention of the rules. The pleader in summarizing a document will, however, have to take great care to correctly state the effect of the portion of it upon which he relies. Clauses which do not come in question he should not allude to; but the effect of all those parts of a contract which he contends the defendant or the plaintiff, as the case may be, has broken, should be given. Where a written document is so concise in its terms, that a statement of its effects would occupy about as much space as the document itself, then there can be no objection to setting the latter out in full. And it will be observed that in an action upon a guarantee, this course is adopted in the Appendix. There is, however, one very important limitation to the rule that the effect of documents should only be given. The proviso of Order XIX. r. 21, is, "*unless the precise words of the document or any part thereof are material.*" Wherever such is the

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case, then the precise words must be set out in the statement of claim or defence, as the case may be.

An action for libel comes under this proviso to the rule. The point arose in *Harris v. Warre* (4 C. P. D. 215 ; 48 L. J. C. P. 310 ; 40 L. T. 429 ; 27 W. R. 461). There the third paragraph of the plaintiff's statement of claim was as follows : "The defendant subsequently wrote and sent to the chief constable of the county of Somerset letters, in which he charged the plaintiff with having been concerned in or guilty of the murder of the said Frederick Merry, and required the said chief constable to cause the plaintiff to be arrested on such charge." The fourth paragraph was, "the defendant also sent to Mr. Goldsmith, the superintendent of police for the district wherein the plaintiff resides, and charged the plaintiff with having been guilty of the said murder, and required the said superintendent to arrest the plaintiff upon the said charge." There was a demurrer to this part of the claim, on the ground that if the plaintiff meant to complain of a libel or slander, the words ought to have been set out.

In actions
for libel
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be set out.

In giving judgment in favour of the demurrer, Lord Coleridge, L. C. J., said : "I am of opinion that this demurrer must be allowed. For the purpose of our decision, we will assume that something improper has been done on the part of the defendant. The plaintiff's statement of claim puts his case apparently on two grounds, namely, malicious prosecution and libel. As to the first, Mr. Petheram has admitted that the facts do not disclose a malicious prosecution. No prosecution was ever instituted, and none was determined in favour of the plaintiff, who is therefore out of Court on this ground. With regard to the second point, the libel is stated in most general terms. It is also admitted that such a form of pleading is new, and that according to the old practice it was necessary to set out the actual words complained of. The reasons for this necessity have often been stated by judges of high authority, and are by no means technical. If it were otherwise, how could the defendant shape his defence ? Everything may turn, and sometimes does turn, upon the peculiar form of the words. In old days a small, but, important variation, proved fatal, if the difference in form amounted to a difference in substance. In cases of libel and slander, the very words are the facts ; and it

*Harris v.
Warre.*

The precise words of a libel must be set out.

is these defamatory words, and not defamatory expressions generally, which form the ground of action. The principle was strongly re-affirmed in a recent case in the Court of Appeal (*The Queen v. Bradlaugh*, 3 Q. B. D. 60; 48 L. J. M. C. 5); and the practice in pleading, therefore, was perfectly clear before the Judicature Acts. But Mr. Petheram contends that Order XIX. r. 4, enables him to do what he has done here. The answer is, that in libel the words are 'the material facts' mentioned in that rule. It is evident, also, that no alteration in the practice was intended to be made: for there is no form of a statement of claim for libel in the forms appended to the Rules of Court. The old practice, therefore, must be retained."

Denman, J.: "I am of the same opinion. The only thing I wish to add is that Order XIX. does not really aid the plaintiff's contention. By rule 24 of that Order, the precise words of a document need not be set out 'unless the precise words thereof are material.' In libel, according to all the decisions, the precise words are most material."

So where the claim is for misrepresentation, and the misrepresentation complained of was contained in a written document, it would seem that those parts of the document which are said to be false should be set out *verbatim*, rather than any attempt be made to give their effect.

Malice, &c., to be alleged as a fact.

3. "Wherever it is material to allege malice, fraudulent intention, knowledge, or *other condition of the mind* of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred." (Order XIX. r. 22.) To set out the circumstances from which the inference of malice, knowledge, &c., is to be drawn, would infringe rule 22, and would be a statement of evidence.

But where "the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence . . . particulars (with dates and items, if necessary) shall be stated in the pleading." (Order XIX. r. 6.) The distinction between rule 6 and rule 22 is obvious. Where the *foundation* of the action is misrepresentation, fraud, breach of trust, wilful default, or undue influence, then particulars of the alleged misrepresentation, &c., must be given; but where malice, fraudu-

lent intention, &c., are only an *element* in a cause of action, in such a case the pleader must state as a fact that malice or a fraudulent mind existed, without going into the circumstances which prove it. For instance, in an action for fraudulent misrepresentation, the pleader must set out the particulars of the misrepresentation, but, with regard to the fraudulent mind of the defendant, it is proper merely to allege that he knew the representations he made were false.

Rules to
secure
brevity.

4. "Where it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form, or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material." (Order XIX. r. 23.)

5. "Wherever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances, without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative." (Order XIX. r. 24.) The first part of this rule—viz. the part contained within the first sentence—speaks for itself; and it is manifest that where it is intelligently applied, a pleading which would otherwise be verbose and prolix will be cut down to convenient limits. It would seem that in cases within the second part of this rule, where the party wishes to rely in the alternative upon more contracts or relations than one as to be implied from the circumstances of the case, the facts and circumstances must usually be set out in a little more detail. It would scarcely be artistic to allege as a fact one contract and then immediately afterwards a totally inconsistent contract as having been made at the same time. The better course would be to state the essential facts, and then say that the plaintiff or defendant, as the case may be, contends that so-and-so was the contract which resulted from them, or in the alternative that—state the other possible contract—was the contract produced.

Contracts
to be im-
plied from
a series of
letters to
be stated
as a fact.

6. "Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the

burden of proof lies upon the other side, unless the same has first been specifically denied." (Order XIX. r. 25.) And then the rule goes on to give as an example of its application, the case of consideration for a bill of exchange, where the plaintiff sues only on the bill and not on the consideration as a substantive ground of action.

Performance of conditions precedent should not be pleaded.

7. "Any condition precedent the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant, shall be implied in his pleading." (Order XIX. r. 14.) The part of this rule which is material in connection with the preparation of a statement of claim, is the latter portion: "An averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant, shall be implied in his pleading." The old formula was to allege in the claim "that all times had elapsed, things happened, and conditions been performed necessary to entitle the plaintiff to sue." And indeed, until the new rules under consideration, some such averment was generally necessary in a claim. Now it is taken as implied in every pleading, and it will be improper to burden it by its insertion.

How settled accounts are to be pleaded.

8. "In every case in which the *cause of action* is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of *evidence* or *admission* of any other cause of action which is pleaded, the same shall not be alleged in the pleadings" (Order XX. r. 8). The effect of this rule is clear. In the second case put the stated account is only evidence, and being evidence, it ought not to be pleaded; but in the first case it is the cause of action, and therefore should be set out with necessary particularity.

9. "In every pleading 'dates, sums, and numbers, shall be expressed in figures and not in words'" (Order XIX. r. 4).

10. Where particulars of any debt, expenses, or damages, ought properly to be given, and they exceed three folios in length, it is sufficient to state in the claim or counter-claim that such particulars do exceed three folios in length, and that

either full particulars have already been delivered to the defendant or that they accompany the statement of claim according to the fact (Order XIX. r. 6).

The first leading rule to secure conciseness of pleadings is that pleadings shall not contain *evidence*. The second is that they shall not contain *inferences and conclusions of law*. This rule follows from Order XIX. r. 4, which provides that a pleading shall contain only the material *facts*; and the impropriety of setting out inferences of law has been pointed out in more than one case. In *Watson v. Rodwell* (3 Ch. D. 380; 45 L. J. Ch. 745; 35 L. T. 86; 24 W. R. 1009), the Lord Justice Mellish said he did not agree with what the Vice-Chancellor was reported to have said, that what would have been properly admitted in the old bill was still admissible in the new pleadings. He thought that what were called "the charging parts," which were merely the pleader's view of the equity, should be omitted. And so in the case of *Hammer v. Flight* (35 L. T. N. S. 127; 24 W. R. 346) Brett, J., in giving judgment, said: "This case is one which shows clearly some of the advantages which have been obtained by the passing of the Judicature Acts. Pleadings now are no longer technical, in the sense that they must show the precise legal form which the plaintiff's demand must take; they now show the facts, and then it is for the Court, from the facts, to decide upon the legal result of these facts. In this case it is clear that something is due from the defendant to the plaintiff, though it may not be so clear what is the legal relation between the parties, or what would have been the exact form of pleading under which the amount due would under the former system of pleading have been recovered."

Pleadings must not contain inferences of law.

A plaintiff, in his statement of claim, need not now state under what particular form of action he is proceeding, nor in what particular legal relation he claims to stand to the defendant. This rule was very clearly stated in the case of *The Metropolitan Railway Company v. Defries* (2 Q. B. D. 189; 36 L. T. N. S. 150; 25 W. R. 271), which was in effect an action for use and occupation. The defendants demurred to the statement of claim, and the case came before Mellor and Field, JJ., in the Queen's Bench Division. Both learned judges concurred in disallowing the demurrer, and in giving judgment Field, J., said: "The de-

Plaintiff need not state under what form of action he is proceeding.

The form
of action
immaterial.

defendants do not deny their occupation, nor the fairness of the sum claimed, nor the payment to them of the interest agreed; they only say this particular form of action cannot be adopted under the circumstances stated in the claim. It is a mistake to suppose that every element in the action for use and occupation must now be contained in a statement of claim in order to enable a plaintiff to recover. We are here to see if the plaintiff shows any cause of action, either in law or equity. The contract stated, coupled with the fact, also stated, that the defendants have been in occupation, is sufficient to raise the inference of such use of the premises as that contemplated in the agreement for which the defendants were to be subject to rent. It seems to me that our judgment should be for the plaintiffs for the amount claimed." The decision of the Queen's Bench was upheld by the Court of Appeal (2 Q. B. D. 387; 36 L. T. 494).

The claim
should not
anticipate
the de-
fence.

The plaintiff in his statement of claim need not and should not plead any facts in anticipation of or to meet the defence. This was a rule of pleading prior to the Judicature Acts (Stephen's Principles of Pleading, 7th ed., 290), and after some discussion it has been finally settled to be the rule under the new system. This was decided in the case of *Hall v. Eve* (4 Ch. Div. 341; 46 L. J. Ch. 145; 35 L. T. 926; 25 W. R. 177). The plaintiff in this case claimed specific performance of an agreement made between the defendants Eve and Whiffen of the one part, and the defendant Lane of the other part, whereby Eve and Whiffen agreed to grant a lease of certain building land to Lane for ninety years, with an option to Lane of purchasing the freehold. The plaintiff in his statement of claim alleged that Lane had transferred his interest to the plaintiff, who gave notice of his intention to purchase, but that Eve and Whiffen refused to execute a conveyance to him. The defendants Eve and Whiffen, by their statement of defence, alleged that before the transfer of the agreement to the plaintiff the defendant Lane had committed certain breaches of his contract which gave the defendants Eve and Whiffen a right to put an end to the agreement, which they had accordingly done. The plaintiff then, by his reply, pleaded that if (which he did not admit) there had been any default or breach of the agreement by Lane, the defendants Eve and Whiffen had waived it; and as to the provision which was

alleged to have been broken, he pleaded that if it had been broken by Lane, the defendants were not entitled by reason of such breach to determine the agreement, for reasons which he stated. He also alleged concealment and false representation and want of equity; and lastly he joined issue with the defendants upon their statement of defence. The defendant moved that the reply might be set aside as erroneous in form; and Bacon, V.-C., acceded to the application on the ground that all the facts stated in the reply should have appeared in the statement of claim either originally or by amendment. The plaintiff appealed, and the Court of Appeal reversed this decision.

The claim should not anticipate the defence.

James, L. J., said: "The question is this. The plaintiff in his statement of claim says: 'I have an agreement of which I am entitled to specific performance.' The defendant by his statement of defence says: 'You are not entitled to specific performance, because you have committed breaches of the agreement and done certain things which entitled me to put an end to the agreement, and I have put an end to it.' The plaintiff in his reply says: 'The facts you allege as your defence are not true, and if they were, they are things which you yourself induced me to do. It is therefore against equity that you should set them up against me.' It is not questioned that a plaintiff ought to be at liberty to say this, if it is true; the only question is whether he is wrong in alleging it by a special reply. Now the Order XIX. r. 2 says that after the plaintiff has delivered a statement of claim, and the defendant a statement of defence, set-off, or counter-claim, 'the plaintiff shall in like manner deliver a statement of reply (if any) to such defence, set-off, or counter-claim.' There is no limit that I can see as to what can be said in reply except that it must not be scandalous or irrelevant. The plaintiff is left as much at liberty in his reply as in his statement of claim. In the present case the plaintiff says 'the defendant has waived his rights.' The defendant says he ought to allege this by amending his statement of claim, not in his reply. Of course if the rules had so provided expressly, the Court would be bound by them; but as the rules have not so provided, it seems to me most illogical that the plaintiff should have to do this. The rule says that the plaintiff must make a statement of complaint, and of the relief or remedy to which he

Hall v. Etc.

Judgment
of James,
L. J.

The claim should not anticipate the defence.

claims to be entitled. *It is no part of the statement of claim to anticipate the defence, and to state what the plaintiff would have to say in answer to it.* That would be a return to the old inconvenient system of pleading in Chancery, which ought certainly not to be encouraged, when the plaintiff used to allege in his bill imaginary defences of the defendant and make charges in reply to them. I am of opinion that, independently of the forms given in the schedule to the orders, in the plain meaning of the rule, the reply is the proper place for meeting the defence by confession and avoidance, and that this reply does no more than this."

Hall v. Erc.

Judgment of Bramwell, L. J.

Bramwell, L. J., said: "I am inclined to think that those who framed these orders intended that the parties should as a general rule go no further than the reply; but as a matter of right that the parties might go as far as that, and that the plaintiff might reply specially, and might also at the same time deny such allegations in the plea as he might think fit. It would sometimes be unjust if he were not at liberty to do so. Suppose a defendant pleaded a release, the plaintiff ought to be allowed to plead that he did not execute the release, and that if he did execute it, that he was induced to do so by fraud. It was manifestly the intention of the framers of the orders that the pleading was to go as far as the reply. Under the old practice, if the plaintiff desired to allege anything by way of confession and avoidance in answer to the plaintiff's reply, of which he desired to give evidence, he was obliged to allege it specially in his rejoinder; whether that is necessary now I do not say. If it is, leave to do so must be obtained. But with the reply it is different; in it the plaintiff can and must allege such new matter if he relies on it. In the Appendix several instances of confession and avoidance in special replies are given; and I think, therefore, the plaintiff may traverse the allegation made in the defence, or confess and avoid them, or both. The 2nd rule of Order XXIV. appears decisive. It implies that the reply may be something besides a simple joinder of issue, and it may be said even without leave of the Court. It amounts almost to a demonstration that the plaintiff may both traverse and confess and avoid in his reply. But it was argued that this is a matter for the discretion of the Judge. I am not of that opinion. The 2nd rule of Order

XIX. says that the plaintiff shall deliver to the defendant a statement of his complaint and of the relief to which he claims to be entitled. In the present case the fact that the defendant had waived the alleged forfeiture was no part of the plaintiff's complaint or of the relief which he claimed. His complaint is that the defendant had broken the agreement, and the relief he prays is specific performance; and it seems to me that it would be out of place and illogical if this new matter of the reply were put into the statement of claim, and certainly the 2nd rule does not require that it should be. *I cannot help thinking that it would be a mischievous thing to anticipate a defence that may never be made.* If the plaintiff were to do this, he might also anticipate every form of defence, and that would lead to great length of pleading. It appears to me that an allegation that the defendants had waived their right is more cheaply, conveniently, and compendiously made in the reply than by amendment in the statement of claim."

Claim must not anticipate the defence.

These judgments may be taken as settling the law that a plaintiff in his statement of claim should not set out facts in anticipation of the possible defences of the defendant. It is sufficient that the pleading should in itself contain a good *prima facie* case without reference to possible objections not yet urged.

On the other hand, a plaintiff may not in his reply, under colour of alleging new facts in answer to the defence, make an entirely new case. Thus, where in his claim the plaintiff charges a simple trespass and conversion of goods against the defendant, a sheriff, and the latter by his defence justified under the execution of a writ of *fi. fa.*, the plaintiff may not by his reply set up that the defendant remained in the house an unreasonable time, and made a greater noise and disturbance than were necessary. These allegations may or may not constitute an independent ground of action. If they do they ought to have been stated in the claim, and are not properly introduced into the reply. (*Byrne v. Duckett*, 10 L. R. Ir. 24.)

But reply must not raise a new case.

In settling a pleading no allegation which is *scandalous* must be introduced. Order XIX. r. 27, provides that the Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which is unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action. But

Scandalous allegations.

an averment is not scandalous within the meaning of this rule, *merely* because it makes a serious, and in one sense scandalous, imputation upon another. An imputation of the kind is only scandalous when, in addition, it is irrelevant to the subject-matter of the action. "Nothing can be better settled," said the Lord Chancellor in *Millington v. Loring* (6 Q. B. D. 190; 43 L. T. 657; 50 L. J. Ch. 217); "than that if relevant allegations cannot be struck out as scandalous." The rule, therefore, against pleading scandalous matter amounts to little, if anything, more than the rule against unnecessary and irrelevant allegations.

Inconsis-
tent facts
may be
pleaded.

The plaintiff may, in the body of his statement of claim, set out inconsistent facts in support of inconsistent claims for relief. The rule is a necessary corollary to the large powers of joining parties given by Order XVI., and by Order XX., r. 6, "Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative." Order XIX., r. 24, also contemplates the pleading of inconsistent allegations. As already stated it provides that, whenever any contract or relation between persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact; "and if, in such a case, the person so pleading desires to rely, in the alternative, upon more contracts or relations than are to be implied from such circumstances, he may state the same in the alternative."

Honduras
Co. v.
Lefevre.

In *Honduras Inter-Oceanic Railway Company v. Lefevre and Tucker* (L. R. 2 Ex. D. 301; 46 L. J. Ex. 391; 36 L. T. 46; 25 W. R. 310), the plaintiff pleaded that the defendant Tucker, as Lefevre's agent, made a certain contract with him, and in the alternative he alleged that Tucker did not have any authority from Lefevre, but represented to the plaintiff that he had; and the claim then wound up with a prayer for specific performance, and damages against Lefevre or for specific performance and damages against Tucker. It was held by the Court of Appeal that this mode of pleading was correct.

Child v.
Stenning.

To the same effect is the case of *Child v. Stenning and another* (L. R. 7 Ch. D. 413; 47 L. T. Ch. 371; 38 L. T. 232; 26 W. R. 265). There the plaintiff, who was lessee of

certain lands, alleged that the defendant Stenning had entered upon them without any title and trespassed, and in the alternative he pleaded that the other defendant, Wagner, who was his lessor had, in breach of a covenant for quiet enjoyment, authorised Stenning to enter on the lands. He claimed damages against the defendants in the alternative. Fry, J., held that the plaintiff was entitled to plead in this way.

Inconsis-
tent facts
may be
pleaded.

In *Bagot v. Easton* (7 Ch. D. 1; 47 L. J. Ch. 225; 37 L. T. 369; 26 W. R. 66), the plaintiff alleged that the defendant and he had entered into an agreement by which the plaintiff was to put a sum of £2,400 into a concern and go out to South America and work certain estates for the joint benefit of himself, the defendant, and a third person; that the agreement of partnership was only to be for three years in the first instance, but the plaintiff was to have the right of continuing it for a term of twenty-one years if he chose. The claim then alleged that the plaintiff went to South America, and greatly improved the estates in question, but that the defendant refused to continue the enterprise any longer, had sent a person out to South America to stop the working of the estates, and refused to honour drafts drawn by the plaintiff for the ordinary purposes of the enterprise, and according to the agreement. The claim also averred that the plaintiff was induced to enter into the agreement by the representations of the defendant that the enterprise would be very beneficial for the plaintiff, and that he and his cousin were to be partners in the adventure not only for three years, but for the further term of twenty-one years, and that he executed the agreement with the intention and in the belief that the rights of partners would be thereby secured to his cousin and himself. The plaintiff claimed a declaration that he was induced to execute the agreement and to give a security by which the defendant was enabled to obtain payment of the £2,400 by the misrepresentation of the defendant and in ignorance of the true effect of such agreement, a rescission of the agreement and repayment of the £2,400, and a declaration that the plaintiff was entitled to a lien on all the assets of the adventure for the £2,400, or in the alternative a dissolution of the partnership between the plaintiff and the defendant, and to have the partnership accounts taken and assets realised and distributed.

*Bagot v.
Easton.*

Application was made to Bacon, V.-C., for an order confining the plaintiff's claim to one or other of the causes of action in respect of which he by his claim sought relief, and that the statement of claim should be amended accordingly. The learned judge being of opinion that the statement of claim disclosed two totally inconsistent states of facts, and two totally different forms of relief upon totally inconsistent grounds, made the order sought. The plaintiff appealed, and the Court of Appeal overruled this decision. The Lord Chancellor, in giving judgment, said that he thought, independently of the Judicature Acts, the alternative relief claimed could have been given: but that in any case those Acts had enlarged the liberty of the plaintiff in claiming relief, and that in view of them, the matter was perfectly clear. It must be remembered that his lordship, in suggesting that relief might have been given in a similar case before the Judicature Acts, was referring, not to common law pleadings, where it is beyond question an alternative case of the kind could not have been set up, but to pleadings by bill in Chancery.

Facts need
not be
assigned to
particular
prayer for
relief.

Facts stated in a pleading need not be assigned to any particular prayer, for so long as they tend to show that the party relying on them is entitled to any part of the relief claimed, they are not objectionable.

Watson v. Hawkins (24 W. R. 884) was a case of a pleading demurred to; but although demurrers are now abolished, there is practically an analogous remedy, and the *ratio decidendi* of that case is applicable to the new system. In giving judgment upon the demurrer Lord Coleridge said: "I thought at first that a defendant was entitled to say, 'I want to know to which portion of your prayer you apply such and such a paragraph of your claim.' But that is not so. By Order XXVIII. r. 1, the ground of a demurrer to any pleading or to any part of a pleading must be 'that the facts alleged therein do not show any cause of action, &c., to which effect can be given by the Court as against the party demurring.' Hence, so long as a paragraph supports some one or more of the claims in the prayer, it is not demurrable. The plaintiff is not bound to assign such and such paragraphs to such and such a prayer. He states all the facts that he deems material, and then he asks for such and such relief; and if each fact

set out tends to show that he is entitled to some relief, and that relief is asked for in one of the prayers, the paragraph setting out that fact must stand." And Lindley, J., expressed an opinion that, unless the party demurring can show that the paragraph demurred to entitles the party pleading it to absolutely no relief, the demurrer must fail.

Every statement of claim winds up with a prayer for the particular relief which the plaintiff requires, and such relief may be asked for in the alternative either against the same defendant or against different defendants. Prior to the Rules of 1883 it was usual to ask for general relief as well: "Such further and other relief as the nature of the case may require." Now, it is neither necessary nor proper to pray for general relief: "It shall not be necessary to ask for general or other relief, which may always be given, as the Court or a judge may think just, to the same extent as if it had been asked for. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his defence." (Order XX. r. 6.)

General
relief
not now
claimed.

The pleader at the end of the claim must state the place at which he proposes to have the trial, unless he is content that the action shall be tried in Middlesex. "The statement of claim must, in all cases in which it is proposed that the trial shall be elsewhere than in Middlesex, show the proposed place of trial." (Order XX. r. 5.)

Venue to
be fixed
in claim.

And then he must sign the pleading. Before the Rules of 1883, the signature of counsel was not necessary to pleadings, though the prevailing practice on the Chancery side was for counsel to sign their pleadings. The rule is now contained in Order XIX. r. 4: "Signature of counsel shall not be necessary; but where pleadings have been settled by counsel, or a special pleader, they shall be signed by him; and, if not so settled, they shall be signed by the solicitor, or by the party, if he sues or defends in person."

Pleadings
to be
signed.

SECTION II.—STATEMENT OF DEFENCE.

The changes made by the Judicature Acts in the form of the statement of defence and the character of the averments it must contain are even more sweeping than in the case of the state-

General
pleas now
abolished,

ment of claim. First, as a matter of form, all the allegations contained in the defence should be arranged in numbered paragraphs, as in a statement of claim; and then, as a matter of substance, all general pleas, under which the defendant might formerly have proved a variety of totally different defences, are abolished, and every defence relied on must be pleaded separately and distinctly. This, as a rule, gets rid for ever of the plea of not guilty, or the general issue, as it was called.

Except

There are, however, two exceptions to this rule abolishing general defences.

“Not
guilty by
statute.”

I. By rule 12 of Order XIX., “Nothing in these rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead, he shall not plead any other defence to the same cause of action without the leave of the Court or a judge.” And by Order XXI. r. 19: “In every case in which a party shall plead the general issue intending to give the special matter in evidence by virtue of any Act of Parliament, he shall insert, in the margin of his pleading, the words ‘by statute,’ together with the year of the reign in which the Act of Parliament on which he relies was passed, and also the chapter and section of such Act, and shall specify whether such Act is public or otherwise; otherwise such defence shall be taken not to have been pleaded by virtue of any Act of Parliament.” When may a defendant plead not guilty by statute? The following is a list of the principal cases in which he has this right:—(1.) By 11 & 12 Vict. c. 44, s. 10, in case of actions brought against justices of the peace for anything done by them in the execution of their office. (2.) By 13 & 14 Vict. c. 61, s. 19, in case of actions brought against the bailiff of a county court, or clerk of a county court (*Dews v. Riley*, 11 C. B. 434), or any person acting by their order, for anything done in obedience to a warrant of the court. (3.) In cases of illegal and irregular distress (11 Geo. 2, c. 19, s. 21). (4.) Police officers and constables, by various statutes, where they are sued for anything done by them in the execution of their office (see 7 Jac. 1, c. 5; and 21 Jac. 1, c. 12, s. 5; 10 Geo. 4, c. 44, s. 41; 1 & 2 Wm. 4, c. 41, s. 19; 2 & 3 Vict. c. 93, s. 8). (5.) In actions against any officer of the

army, navy, marines, customs, or excise, or against any person acting under the direction of the commissioners of customs for anything done in execution of the Customs Acts (16 & 17 Vict. c. 107, ss. 313, 317). (6.) By 42 Geo. 3, c. 85, s. 6, all persons holding any public office, civil or military, and having authority to commit persons to safe custody, can, when sued for any act done by them in the discharge of their duty, plead not guilty by statute. (7.) Generally in the case of penal actions (21 Jac. 1, c. 4, s. 4, and see *Earl Spencer v. Swannell*, 3 M. & W. 154; *Jones v. Williams*, 4 M. & W. 375). (8.) In cases where persons have acted in pursuance of the 24 & 25 Vict. c. 96 (the Larceny Act); the 24 & 25 Vict. c. 97 (Malicious Injuries to Property Act); the 24 & 25 Vict. c. 99 (the Coinage Act); the 5 & 6 Wm. 4, c. 50 (the Highway Act); or under the subsequent Acts relating to highways; the 30 & 31 Vict. c. 125 (the Contagious Diseases Animals Act). This does not profess to be an exhaustive list of the cases where the defence of "not guilty by statute" can be pleaded, but it includes a great majority of the cases; and in a given case the pleader can have no difficulty in ascertaining whether there is any statute authorizing this general form of pleading.

"Not
guilty by
statute."

II. A defendant in an action for the recovery of land can, if he likes, plead that he is in possession of the premises sought to be recovered, and under this plea he may rely upon any ground of defence which he can prove. This is provided by Order XXI. r. 21: "No defendant in an action for the recovery of land who is in possession by himself or his tenant, need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies or does not admit the allegations of fact contained in the plaintiff's statement of claim. He may nevertheless rely upon any ground of defence which he can prove except as hereinbefore mentioned." There was a similar provision in the Rules of 1875, except that the words "and it shall be taken to be implied in such statement that he denies or does not admit the allegations of fact contained in the plaintiff's statement of claim" were omitted.

Defendant
may plead
his posses-
sion merely
in action
for recovery
of land.

And it was held by the House of Lords, in *Danford v. McAnulty* (8 Appeal Cases, 456) that a statement of defence alleging that the defendant was in possession, without any further denial of the averments in the statement of claim, operated as a sufficient denial of them, and put the plaintiff to their proof. In view of this decision by the highest tribunal, it does not seem that the new words add anything to the operation of the rule. It will probably in most cases be desirable for a defendant sued in an action for the recovery of land merely to plead that he is in possession.

Incon-
sistent
defences
allowable.

A defendant may plead as many defences to the same cause of action as he thinks he can prove, and it makes no matter that the defences are in their nature inconsistent. But by Order XXI. r. 9, "where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court or a judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted." And by Order XXXII., one party to a cause can, by notice in writing, call upon the other party to admit "any specific fact or facts mentioned in such notice," and in case "of refusal or neglect to admit the same," the Court may, whatever the result of the trial, order the party failing to make the admissions to pay the costs occasioned by proof of the facts in question unless it "certify that the refusal to admit was reasonable." The full text of Order XXXII. is set out in the Appendix.

Admissions
compelled.

When the Judicature Rules first came into operation it was thought in some quarters that inconsistent defences were improper, and where they were pleaded objection was in several cases taken to them.

Instances
of incon-
sistent
defences.

Thus in *Restell v. Steward* (W. N. 1875, 231), to an action for slander, the defendant pleaded—(1) that he did not speak the words complained of; (2) that he did not speak them maliciously; and (3) that they were true (justification). It was urged that such inconsistent defences as a denial and justification could not be pleaded together; but the learned judge at chambers (Quain, J.) disallowed the objection.

Another case upon the same point is *Barnicot v. Hann* (W. N. 1876, 24). This was an action for money lent, and the defendant had pleaded—(1) that the plaintiff never lent

the money; (2) that if he did, he lent it to somebody other than the defendant; (3) that the defendant had paid the money; and (4) that the plaintiff had released the defendant from the payment of it. Objection was taken that all these inconsistent defences could not be pleaded together; but Mr. Justice Lindley overruled the objection, remarking that when the old form of pleading is applicable there is no objection to it. The defendant was entitled to say that the money was never lent to him, and that if it was he has paid it or been released.

Incon-
sistent
defences
allowable.

In *Spurr v. Hall* (46 L. J. Q. B. 693; 37 L. T. 313; 26 W. R. 78; 2 Q. B. D. 615), the question for the decision of the Queen's Bench was whether payment into Court could be pleaded along with various other defences to a claim; but in the course of his judgment Mr. Justice Field expressed in clear and precise terms the general right of a defendant to plead inconsistent defences to the same cause of action. "This action," said his lordship, "is brought for three things; first, for permanent damage caused to the plaintiff's reversion by interfering with light; secondly, for interfering with a water-spout; and, thirdly, for taking away a stone from a wall belonging to the plaintiff. The defendants have pleaded, denying the plaintiff's right to sue as reversioner, denying that the dwelling-house in question is interfered with, denying the right to light, and denying that the plaintiff has been injured either by the interference with the water-spout or by the removal of the stone. All these defences the defendants have a perfect right to put on to the record together; but they have also pleaded in the following words. [The learned Judge then read the 9th paragraph of the defence, which pleaded a payment of £20 into Court.] The result, therefore, is that the defendants have paid £20 into Court in respect of the same causes of action as those the existence of which they deny. . . . In the first place, the pleadings are clearly inconsistent, but ever since the statute enabling several pleas to be pleaded together (4 & 5 Anne, c. 16, s. 4), it has been held to be no cause for objecting to pleas that they are inconsistent with each other, and such pleas have been habitually pleaded together. But this permission has never been extended to pleas of payment into Court, which stand upon a different footing. Before

Spurr v.
Hall.

Judgment
of Field, J.

Incon-
sistent
defences
allowable.

the Judicature Acts (except in certain instances specified in the Common Law Procedure Act, 1852, s. 4), leave was wanted to plead several pleas together, and payment into Court was never permitted to be pleaded together with any other plea to the same cause of action. The question before us now is whether any change has been introduced as to this by the Judicature Acts. Under those Acts, no leave to plead several defences together is wanted, and the only remedy which the plaintiff has when defences are improperly joined is to apply under Order XXVII. r. 1."

When pay-
ment into
court may
be pleaded
with denial
of liability.

O. XXII.
r. 1.

But while the general rule was, and is, as stated, that a defendant might plead inconsistent defences, there was a good deal of discussion upon the Rules of 1875 on the question whether a defendant might plead a payment into Court along with defences denying liability. The result of the cases was that this course was permissible even in actions for libel. (*Hawksley v. Bradshaw*, 5 Q. B. D. 302; 49 L. J. Q. B. 333; 42 L. T. 285; 28 W. R. 557.) All controversy on these points is now set at rest by the Rules of 1883, which provide that a defendant may plead payment of money into Court along with a defence, denying liability in all cases except *libel* or *slander*. "Where any action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court or a judge, pay into Court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability (except in actions or counter-claims for libel or slander), pay money into Court, which shall be subject to the provisions of rule 6; provided that in an action on a bond, under the Statute 8 & 9 Will. III. c. 11, payment into Court shall be admissible to particular breaches only, and not to the whole action." (Order XXII. r. 1.) By rule 2, "payment into Court shall be signified in the defence and the claim or cause of action, in satisfaction of which such payment is made shall be specified therein."

In *Paraire v. Loibl* (49 L. J. Ch. 481; 43 L. T. 427) it was decided by the Court of Appeal upon the corresponding rule of the Rules of 1875, that where a plaintiff claims for distinct pieces of work and labour, alleged in separate para-

graphs of the statement of claim, a defendant who has paid money into Court generally, need not specify in his defence how much is paid in respect of each head of claim. "It might," said Bramwell, L. J., "work a great injustice to the defendant if he was compelled to specify how much he had paid into Court in respect of each item. He might be unable so to particularise where he had paid sums from time to time on account, and the plaintiff was suing for a balance. I doubt very much whether Order XIX. r. 9 has any application, because a plea of payment into Court is not a defence to the plaintiff's claim; on the contrary, it is a statement by the defendant that, to a certain extent, the claim is well founded. I say nothing about the plaintiff's right to particulars from the defendant as to the money he has paid into Court."

Payment
into court.

Where money has been brought into Court as a condition of leave to defend, the defendant may, unless the Court or a judge otherwise order, "by his pleading appropriate the whole or any part of such money and any additional payment if necessary, to the whole or any specified portion of the plaintiff's claim; and the money so appropriated shall thereupon be deemed to be money paid into Court pursuant to the preceding rules of this Order, relating to money paid into Court, and shall be subject in all respects thereto." (Order XXII. r. 11.)

A defendant will wish either to admit, to deny, or to confess and avoid the allegations contained in the statement of claim. Where he wishes to deny them, he may wish either to deny that the contract or tort sued on was made or committed in fact, or to deny the sufficiency in law of the contract with reference to the way it was entered into, or the evidence by which it is proved.

The course of a defendant who desires to *admit* any averment is perfectly clear. "Every allegation of fact in any pleading, not being a petition of summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition." (Order XIX. r. 13.) This rule is subject to an exception in the case of the allegation of damages in a claim or counter-claim. In every defence a denial of the damages claimed is *implied*, unless they

Allegations
not denied
taken as
admitted.

Except
averments
of damages.

How aver-
ments may
be ad-
mitted.

are expressly admitted. (Order XXI. r. 4.) With this exception, therefore, the proper course to be taken by a defendant wishing to admit an allegation is to take no notice of it. Do not specially admit it; that is unnecessary, and the insertion of anything unnecessary in pleading is prolixity. Of course, if the defendant wishes to admit part but to deny another part of the same allegation or the same paragraph, it may be convenient specially to aver that he admits so and so and denies the rest; but where, as often happened, there were two or three paragraphs in the statement of claim which the defendant did not call in question, it was surplusage specially to plead, as was often done, that "the defendant admits the allegations contained in the ——— paragraphs."

How they
are denied.

The case of a defendant who wishes to *deny* the allegations in the statement of claim is necessarily the most common case.

In the first place the pleader must take care that he does deny the averments he is not prepared to admit. Otherwise they will be taken as admitted. An exception to this rule was stated by the Master of the Rolls in *Chillon v. The Corporation of London* (7 Ch. Div. 735; 47 L. J. Ch. 433; 38 L. T. 498; 26 W. R. 474), where he held that the mere admission or non-denial by the defendant of a right asserted by the plaintiff, *but which has in fact no existence in law*, is not sufficient to entitle the plaintiff to judgment. Subject to this exception the rule is that an averment not specifically denied is taken to be admitted.

But *any* form of denial is not sufficient. It must be a denial in strict conformity with a series of rules, to be presently mentioned.

There are three rules, viz., rules 17, 19, and 20, of Order XIX. which deal with the general method of denying matters sought to be put in questions; and four other rules, viz., rules 1, 2, 3, and 5, of Order XXI., which provide for denials in particular classes of actions.

Coming first to the form of denials in all actions, the following are the rules that call for attention:—

Denials
must be
specific.

1. "It shall not be sufficient for a defendant in his statement of defence to deny *generally* the grounds alleged by the statement of claim . . . but each party must deal *specifically* with each allegation of fact of which he does not admit the truth, except damages." (Order XIX. r. 17.)

2. "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances it shall not be sufficient to deny it along with those circumstances."

Denials
must not
be evasive

3. "When a contract, promise, or agreement, is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise."

Rules 20, 21, and 23, Order XIX., of the Rules of 1875, were substantially the same as the above rules, and upon them a series of cases were decided, to which it is now necessary to advert.

In *Thorp v. Holdsworth* (3 Ch. Div. 637; 45 L. J. Ch. 406), the action was brought by the plaintiffs for the purpose of obtaining a dissolution of their partnership with the defendant. The statement of claim alleged that in August, 1875, the plaintiffs and defendant agreed to take a lease of a brickfield and carry on in partnership the business of brick manufacturers, and that in pursuance of such agreement the plaintiffs procured to be granted to them a lease of the premises, and had since purchased the plant and stock-in-trade. In paragraph 3 they went on to allege that early in the same month they and the defendant caused draft articles of partnership to be prepared for the purpose of defining the terms of the partnership; that the said draft articles were considered and approved by the plaintiffs and defendant at an interview between them on the 17th September, subject to their being submitted by the defendant to his solicitor, and being revised and finally settled by him; that the said draft had not yet been revised, and the articles had not yet been executed; that although the draft articles were only settled subject to revision, the terms of the arrangement between the plaintiffs and defendant as

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Hold-
worth.

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Holdsworth.*

Judgment
of Jessel,
M. R.

therein provided were definitely agreed upon at the interview, and the defendant procured the plaintiff to sign the draft articles to prevent any question being raised by him as to the terms agreed upon; and that neither the defendant nor his solicitor had intimated any objection to the terms of the said draft articles. In his defence the defendant made certain admissions, and proceeded as follows: "With respect to paragraph 3, the defendant says that his solicitors abstained from finally revising and settling the draft articles of partnership until the said trustees should determine whether or no they would make the above-mentioned advance. The defendant denies that the terms of the arrangement between himself and the plaintiff were definitely agreed upon as alleged." The case then came before Jessel, M. R., on a motion by the plaintiff for final judgment under Order XL. r. 11.

In giving judgment his lordship said: "It is as well to say that in construing the pleadings with regard to Order XIX. r. 22, I shall construe them strictly. It was intended that they should be construed strictly, in order specially to enable the plaintiff to know what the real issue between him and the defendant was. The whole object of pleading is to bring the parties to an issue, and the meaning of the rules of Order XIX. was to prevent the issue being enlarged, which would prevent either party from knowing, when the cause came on for trial, what the real point to be discussed and decided was. In fact the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing. The 11th rule of Order XL. enables the plaintiff or defendant to get rid of so much of the action as to which there is no controversy. That is the meaning of it. It may be that the whole issue may not be in controversy, and thereupon either party may be entitled to move on admissions of fact in the pleadings. What amounts to admissions of fact in a pleading is defined by the 17th rule of Order XIX. 'Every allegation of fact in any pleading . . . if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted.' Consequently, all you have to find is no specific denial or no definite refusal to admit. Then the question is

what 'if not specifically denied' means, and that is again defined in subsequent rules. The 20th rule says [his Lordship read it]. There it will be seen it is not merely denial that is meant, but the rule covers non-admission, for each party is to deal specifically with every allegation of fact of which he does not admit the truth. Therefore he must be quite as specific under the 20th rule when he does not admit as when he says 'I deny.' In fact they are both covered by the 20th rule. Then in order that there shall be no mistake as to the meaning of the word 'specifically' in the 20th rule, the 22nd rule says this [his Lordship read the rule]. Applying that rule to the pleadings in the present case, let us see what comes of it. The plaintiffs allege an agreement to take a lease and carry on a partnership. They allege that in pursuance of the agreement they took a lease, and that the draft articles were prepared to define the terms of the partnership; that there was an interview on the 17th September, and that the same were approved by the parties, subject to being submitted by the defendant to his solicitor, and being revised and finally settled; that the draft had not yet been revised and the articles had not yet been executed, and that, although the draft articles were only settled subject to revision, the terms of the arrangement between the plaintiffs and the defendant as therein provided were definitely agreed upon at the said interview, and the defendant procured the plaintiff Stackpoole to sign the draft articles in order to prevent any question being raised by him as to the terms agreed upon. The defendant does not deny a word of these allegations, except that part which alleges that the terms were definitely settled, and as to that he says: 'The defendant denies that the terms of the arrangement between himself and the plaintiffs were definitely agreed upon as alleged.' Now that is evasive. 'As alleged' means the whole allegation in the statement of claim, not the allegations of the particular paragraph. I cannot tell from his pleading what part of the allegation of the plaintiffs the defendant intends to deny. He may intend to deny that the terms were definitely agreed upon at the interview of the 17th September, although they were at some other day, or he may have some peculiar view as to the meaning of the word 'definitely.' He may not be able to say that the terms were not arranged as agreed upon, but he may

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denials.*

take the word 'definitely,' because he thinks it may give him some mode of escape. I cannot make out what he means. He is bound to deny that any agreements or any terms of arrangement were ever come to, if that is what he means; if he does not mean that, he should say there were no terms of arrangement come to, except the following terms, and then state what the terms were; otherwise there is no specific denial at all. Mr. Cookson submitted to me that it was a great hardship on a defendant who was asked to perform a parol agreement, the terms of which were not accurately stated by the plaintiffs, to be compelled by his own pleadings to state what the terms were. It would be a very extraordinary notion of the administration of justice to treat such a complaint seriously. It is the very object we have always had in view in pleading to know what the defendant's version of the matter is in order that the parties may come to an issue. If you have an agreement for a lease containing fifty stipulations made by parol, and the plaintiff and the defendant both agreed that there was such an agreement, and, except as to one of the fifty stipulations that it had been carried out and acted upon, what would be said of a Court of Justice if it allowed the defendant simply to deny that there was any such agreement as alleged, so that the plaintiff should be compelled to come to trial with witnesses to prove every one of the fifty stipulations of the agreement. Of course the defendant ought to admit that forty-nine were made, and deny the fiftieth, and then the cause would come to trial upon the question whether the fiftieth stipulation alleged did or did not form part of the agreement. That is not hard upon a defendant: it is the proper mode of carrying on the administration of justice. That is the meaning of the rules, and I have said as much as I have done that solicitors may be aware in future that I shall insist upon the rules of pleading being complied with." His Lordship then entered final judgment for the plaintiff.

*Thorp v.
Holdsworth.*

*Byrd v.
Nunn.*

Byrd v. Nunn (L. R. 5 Ch. D. 781; and on appeal, 7 Ch. D. 284; 47 L. J. Ch. 1; 37 L. T. 585; 26 W. R. 110) is a case to the like effect. It was an action for specific performance. The plaintiff delivered a statement of claim, of which the following is the paragraph material to the present purpose: "On the 20th day of Feb., 1865, the defendant's predecessor in title,

John Hutley, of 1 and 2, High Street, Bloomsbury, in the county of Middlesex, provision merchant, agreed by writing under the hand of his agent, thereunto lawfully authorized by writing, with the plaintiff's predecessor in title, Anthony Byrd, of 14, Wallbrook Road, East Hill, Hoxton, in the same county, to grant to the said Anthony Byrd a lease of the freehold house and premises No. 77, Cross Street, late 30, Cross Street, Islington, for a term of twenty-one years from the 29th day of September, 1865, at a rent of £60 per annum clear." The first paragraph of defendant's statement of defence was as follows: "The defendant denies that on the 20th of February, 1865, the defendant's predecessor in title, John Hutley, of Nos. 1 and 2, High Street, Bloomsbury, in the county of Middlesex, provision merchant, agreed by writing under the hand of his agent, thereunto lawfully authorized by writing, with the plaintiff's alleged predecessor in title, Anthony Byrd, of 14, Wallbrook Road, East Hill, Hoxton, in the same county, to grant to the said Anthony Byrd a lease of the freehold house and premises No. 77, Cross Street, late 30, Cross Street, Islington, for a term of twenty-one years from the 29th day of September, 1865, at a rent of £60 per annum clear. On the 20th of July, 1865, the said John Hutley was of unsound mind, although not so found by inquisition, and he was wholly incapable of lawfully authorizing, and did not lawfully authorize, any person as his agent to sign any such agreement as is in the plaintiff's statement of claim alleged." The defendant then denied several other allegations, and alleged that the plaintiff had been in possession as a yearly tenant only; and the 5th paragraph was as follows:—"The defendant denies that any agreement for a lease of the said premises to the plaintiff or his alleged predecessor in title was ever made, entered into, or signed by the said John Hutley or any person by him lawfully authorized."

*Evasive
denials.*

*Byrd v.
Nunn.*

On the action coming on for trial, plaintiff's counsel contended that on the pleadings the defendant could not deny the agreement alleged in the claim, and that the agent was authorized to make it. Fry, J., took this view, and refused leave to amend the statement of defence by adding an allegation that the agent was not authorized to make the agreement.

The Court of Appeal confirmed Fry, J. In giving judgment,

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denials.

Thesiger, L.J., said: "The question remains whether the defendant has sufficiently pleaded in his statement of defence the point which he now desires to raise. I agree with the learned Judge that he has not done so. A variety of matters are set forth in the statement of claim showing the plaintiff's cause of action, namely, that the agreement was made, that it was in writing, and that it was made by an agent properly authorized. Under the old common law system of pleading, all those matters necessary to be stated might have been put in issue by pleading the general issue, which would have had the effect of traversing all the particular allegations. But that system of pleading, while it tended to raise clear issues, had the disadvantage that the plaintiffs had no means of knowing what the real point to be tried was. The new rules were expressly framed to prevent that, and to make the defendant take matter by matter, and traverse each of them separately. Has the defendant done this in the present case? He seems to me to have fallen back into the old system of common law pleading, except that, instead of pleading *non assumpsit*, he has amplified that plea by traversing as a whole the several allegations of the plaintiff in such a manner as, but for the present rules of pleading, would put him in the position of being able to disprove any one allegation without the others. I think it is a question whether the first paragraph of the defence ought not to have been struck out as embarrassing. But I think that on a fair construction of that paragraph, the defendant may be taken to have meant that the agreement was not made by an agent properly authorized, because the principal was of unsound mind, and therefore I agree with the Judge that the issue of the authority of the agent, apart from the incompetency of the principal, was not raised by that paragraph. As to the fifth paragraph, I at first thought there was some force in Mr. Fischer's argument that it sufficiently raised the question of agency; but when that paragraph is looked at attentively, it is clearly contrary to the rules which have been drawn up to prevent that kind of pleading. There is no specific fact traversed by that paragraph, but as in the case of the first paragraph, so the fifth is also open to the remark that under it the defendant might have set up either, first, that there was no agreement in fact; or secondly, that it was not

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Nunn.

in writing; or thirdly, that the agent had no authority; or fourthly, that the principal was not competent to give authority, being of unsound mind—the very thing that the rules were intended to prevent. As the unsoundness of mind was the substantial defence set up, I think we must read the statement of defence altogether as referring to that ground of defence, and must conclude that it does not raise the general issue that there was no agreement by an agent duly authorized.”

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denials.*

In *Harris v. Gamble* (7 Ch. D. 877; 47 L. J. Ch. 344; 38 L. T. N. S. 253), to a statement of claim for specific performance the defendant delivered a statement of defence in the following words: “The defendant puts the plaintiffs to proof of the several allegations contained in their statement of claim.” Fry, J., held that this was not a proper mode of denying the averments in the claim, and that, acting upon rules 17 and 20 of Order XIX., the allegations of fact contained in the statement of claim must be taken to be admitted, and he gave judgment accordingly.

*Harris v.
Gamble.*

To the same effect is the decision in *Rutter v. Tregent* (12 Ch. D. 758; 48 L. J. Ch. 791; 41 L. T. 16; 27 W. R. 902), where in a foreclosure action the defendant merely pleaded that he did not admit the correctness of the allegations in the claim, and required proof of them. So in *Dunne v. Clancy* (6 L. R. Ir. 305), to a statement of claim setting out a contract, and alleging breaches of it, a general denial that the party pleading “does not admit,” or “he denies the statements” in the statement of claim was held insufficient.

Tildesley v. Harper (7 Ch. D. 403; 47 L. J. Ch. 263; 26 W. R. 263; 38 L. T. N. S. 60), also decided by Fry, J., is a strong case, from the circumstance that a statement of claim which charged fraud was taken to be admitted on the ground of the imperfection of the form of the denial. It was an action to set aside a lease of certain trust property, improperly given, as was alleged, by the trustee Matthew Tildesley to the defendant. The claim averred *inter alia*: “The defendant, knowing as he did that the plaintiff M. T. was in straitened circumstances at the time, offered him the said M. T. a bonus, or in fact a bribe of £500 if he would grant him the said lease for twenty-one years at the rent of £200, and arranged to give him such sum of £500 if he

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would grant such lease; and the plaintiff, M. T., being at the time very hard pressed for money, accepted such offer, and assented to such arrangement, and in fact granted the defendant the said lease in consideration of such bribe and in pursuance of such arrangement. And the defendant has, in pursuance of such arrangement, and in fact, paid to the plaintiff M. T. £200, part of the said £500." The seventh paragraph of the defendant's statement of defence was as follows: "The defendant denies that he knew that the plaintiff M. T. was in straitened circumstances at the time. The said defendant denies that he offered the said plaintiff personally a bonus, and in fact a bribe of £500 if he would grant him the said lease for twenty-one years at the rent of £200, and arranged to give him such sum of £500 if he would grant such lease, and that the plaintiff, being at the time very hard pressed for money, or in fact accepted such offer, and assented to such arrangement, or in fact granted the said defendant the said lease in consideration of such bribe, or in pursuance of such arrangement. The said defendant denies that he has in pursuance of such arrangement, and in fact paid to the said plaintiff M. T. the sum of £200, part of the said sum of £500." At the trial of the action plaintiff's counsel contended that defendant's denial of the fact of the bribe was evasive, and that therefore the plaintiff was entitled to judgment as upon an admission.

Tildesley
v. Harper.

Fry, J., in giving judgment, said: "It must be observed that the denial here is a denial of a whole string of circumstances, and that it would be justified by proof that any one of these circumstances was not true. Now, what is the form of pleading required by the new rules? This is sufficiently pointed out by Order XIX. r. 22: 'When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance.' The question is, What is here the point of substance? Undoubtedly it is that a bribe was given by Anderson to Tildesley, and that point of substance is nowhere met. The rule proceeds: 'Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else

set out how much he received.' Now, that illustration applies to this case. This denial would be true if any part of the £500 had been offered or accepted. Again, the rule proceeds: 'And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with all those circumstances, but a fair and substantial answer must be given.' This, as I have already pointed out, is a denial of a fact along with the circumstances, and no fair and substantial answer is given to the allegation that there was a bribe. In my opinion it is of the highest importance that this rule of pleading should be observed strictly, and being convinced that it is one of the highest benefit to suitors in the Court, I, for my part, intend to give the fullest effect to it."

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The Court of Appeal (10 Ch. D. 393 ; 48 L. J. Ch. 495 ; 39 L. T. 552 ; 27 W. R. 249) overruled Fry, J., to the extent only that it gave the defendant leave to amend.

In *Collette v. Goode* (2 Ch. D. 842 ; 47 L. J. Ch. 370 ; 38 L. T., N. S. 504) the plaintiff claimed damages for an alleged infringement by the defendant of his copyright in a song. The claim alleged that the plaintiff was the author and composer of a song entitled "What an Afternoon," which was a book within the meaning of the 5 & 6 Vict. c. 45 ; that he was the sole proprietor of the copyright therein ; and that the song had been duly registered at Stationers' Hall, in accordance with the provisions of that Act. The defendant, in his defence, pleaded : "The defendant denies that the said song has been duly registered at Stationers' Hall. The time of the first publication thereof is not truly stated in the registry." At the trial it appeared that at the time of registering the song the publisher's name was not correctly stated, and the defendant's counsel sought to rely on this as sustaining the defence that the song was not duly registered. It was not disputed that this was a fatal objection to the plaintiff's right to recover, if upon the pleadings he could rely upon it ; but it was urged that the defendant could only rely on the defence specially pleaded, viz., that the time of the first publication was not truly stated.

Collette v. Goode.

Mr. Justice Fry took this view, remarking, "The first question is, whether the defence that the name of the publisher

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denials.**

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Goode.*

is not truly stated, is open to the defendant on the pleadings as they stand? . . . There is a paragraph which says, 'The defendant denies that the said song has been duly registered at Stationers' Hall. The time of the first publication thereof is not truly entered in the registry.' The paragraph contains, first, a general proposition denying that there has been a due registration; and, second, a particular allegation that the date of first publication has been untruly stated. Section 13 of the Copyright Act requires some six or eight matters, among them the date of the first publication and the name of the publisher, to be truly stated in the register, in order to make due registration; and if any one of them is false, it will invalidate the registration. The defendant alleges that one of these matters is falsely stated, and if that be so, he is justified in his denial of due registration. He might have been equally well justified by alleging a false statement of any other of the six matters which are required to be stated; but he has, in fact, alleged a false statement of only one of them. I hold that the point pleaded is the untrue statement of the date of first publication, and from that the defendant has stated a conclusion of law that the registration was undue. This will not let in evidence of any other false statement which would render the registration invalid. I am of opinion that this case is governed by *Byrd v. Nunn*, and that on the pleading the defendant cannot go into the question whether the name of the publisher is truly stated or not."

So in *Hayes v. Corcoran*, 8 L. R. Ir. 75, when to an action in ejectment by an assignee of the reversion against the assignor, the defence denied that the defendants assigned or made over the premises to the plaintiff, it was held that the only issue was the execution of the assignment, and that it was not open to the defendants to contend that the assignment, though in fact executed, was illegal and void, as contrary to a covenant against alienation in the lease. See also *Hildige v. O'Farrall*, 8 L. R. Ir. 158; *Barnes v. Barnes*, *ibid.* 165; *Rowley v. Laffan*, 10 L. R. Ir. 9, for other instances of evasive denials.

The cases we have quoted above show that a rigid interpretation was given to rules 20 and 21 of the Rules of 1875, directed against evasive denials, and there is no reason to

believe the corresponding rules of the Rules of 1883 will receive a more liberal construction.

Where a defendant wishes to deny, *as a fact*, that he has committed a particular act, or entered into a particular contract, he must have regard to the provisions of rules 17 and 19, already set out. Where, however, instead of wishing merely to rely upon a denial of the facts, he intends setting up the defence that the particular contract on which he is sued was not made with all the formalities required by law, he must do more than merely deny that it was made. By rule 20 of Order XIX. the bare denial of a contract is only a denial that it was made in fact, and is not "a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise." The defendant in this case must specially allege in his defence the particular objection he means to take to the sufficiency, in law, of the alleged contract. "The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds." (Order XIX. r. 15.) The corresponding rule, in the Rules of 1875, was rule 18. It was not so full as the new rule in its specific enumeration of the grounds of defence which must be specially pleaded. But the words used were wide enough to require the defendant to plead every fact which, under rule 15 of Order XIX., he is now required to plead.

Denial of the sufficiency in law of a contract.

Clarke v. Callow (5 Ch. D. 660; 46 L. J. Ch. 58) is an authority, though upon the clear words of the rule it would seem that authority is hardly necessary, that the Statute of Frauds must be specially pleaded. This was an action brought to recover the price of barley sold by the plaintiff to the defendant. The statement of claim alleged a contract for the sale of the barley by the plaintiff to the defendant, and also (paragraph 3) that the defendant had "accepted and actually received the

Pleading to
the suffi-
ciency in
law of a
contract.

said barley." The statement of defence merely denied the making of the contract, and also the acceptance and receipt. At the trial a verbal contract for the sale of barley was proved, but the jury found that the defendant had not received the barley. The learned judge (Field, J.) directed a verdict for the plaintiff, ruling that the issue as to receipt which had been found in the defendant's favour was immaterial, as the Statute of Frauds had not been specially pleaded. The defendant moved the Queen's Bench for a new trial, on the ground that there was no contract between the parties within the Statute of Frauds; but the Queen's Bench refused a rule, and the defendant appealed. The Court of Appeal upheld the decision of the Queen's Bench.

*Clarke v.
Callow.*

In giving judgment, Kelly, C.B., said: "The case must be decided on these pleadings, and the law says that if the defendant wishes to avail himself of the defence offered by the Statute of Frauds he must plead that statute specially—he must allege that he intends to rely on the statute. Here there is no such allegation, therefore the principal issue is found at once for the plaintiff. Going over the other issues, we come to that raised in the 3rd paragraph of the statement of claim. There the plaintiff alleges that there has been an acceptance and actual receipt of the goods, or part of them. The defendant says that this is not true; and thereupon the judge says (and he is right in saying), that this is merely the allegation and traverse of an immaterial fact. It is urged on the part of the defendant that the plaintiff has anticipated the defence of the Statute of Frauds in his statement of claim, and that therefore the defendant need not aver that he relies on the Statute, as that is already understood. But this would introduce into the system of pleading a fiction which would always be inconvenient, and would sometimes be extremely unjust. No doubt the plaintiff introduces an allegation of acceptance and receipt, which the defendant denies. But it does not necessarily follow that the defendant intends to take advantage of the Statute of Frauds."

Brett, L.J.: "As a general rule, all that is required in pleading is, that the plaintiff and the defendant should state clearly and concisely the facts upon which they rely. But in the case of some particular defences, where it is admitted or cannot be denied that a contract was entered into by the parties, the

defendant may wish to evade his liability by setting up the Statute of Frauds, or by asserting that the engagement he made, the nature of which he perfectly understood when he made it, was illegal, and therefore not binding. In such a case the defendant must state specifically the statute on which he intends to rely. Order XIX. r. 23 is intended, in my opinion, partly as an enunciation of the jealousy with which the law regards that class of defences, and partly to assimilate the practice at law and equity. If rule 23 is to be obeyed, if the defendant intends to insist on the defence, that though he undoubtedly entered into a contract, yet as that contract was not in writing he does not intend to observe it, then he must clearly state his intention, or, if he means to deny the legality of a contract he has entered into, he must state so in plain terms. Here the defendant admits that there is a contract unfulfilled between him and the plaintiff; but he says that he is exempted from the operation of rule 23 because the plaintiff put forward an allegation to show that the contract was a binding one under the Statute of Frauds. But the plaintiff has not put forward all the facts that are available for that purpose. He has not averred that the contract was in writing. It is quite consistent with these pleadings that there was a binding contract within the Statute of Frauds. But even if the plaintiff had averred that the contract was in writing, or that there had been acceptance and receipt, and the defendant had taken issue, so that there could be no doubt as to the meaning of the plea, yet if he traversed the averments without stating the statute on which he relied, the defence under the statute would not be admissible, for he must set forth his intention to use that defence in clear terms." Mellish, L.J., and Amphlett, L.J., concurred.

Pleading to the sufficiency in law of a contract.

Clarke v. Callow.

See also *Callington v. King* (5 Ch. Div. 660; 46 L. J. Ch. 384; 36 L. T. 526; 25 W. R. 550); *Dawkins v. Penrhyn* (4 App. Cas. 51; 48 L. J. Ch. 308; 39 L. T. 583; 27 W. R. 173); *Pullen v. Snelus* (48 L. J. C. P. 394; 40 L. T. 363; 27 W. R. 534). In the latter case it was decided that where a defendant relies upon the Statute of Frauds he must not only state in his defence that he relies on such statute, but the facts which make the statute applicable must distinctly appear in the pleadings. It would seem, however, that now it is

sufficient for the defendant to say what section (naming it) of the Statute of Frauds has not been complied with (Appendix O., Section 4, General Defences).

In addition to the three general rules already given requiring a specific answer in the case of every pleading, there are four other rules which specially provide for such a detailed answer in the case of particular actions.

Defences to
specially
endorsed
writs.

The pleader is aware that in a considerable number of cases the writ may be specially endorsed, and in such cases a statement of claim is dispensed with. The object of rules 1, 2, and 3 of Order XXI. is to secure a proper statement of the particular defences on which the defendant will rely in cases where the claim has been stated in the brief and compendious form thus authorised. A plaintiff is allowed to state generally that the defendant owes him so much for goods delivered between certain dates, or whatever the cause of action may be ; but the defendant may not answer generally that he is not indebted, and leave the matter there. The rules are as follow :—

1. “In actions for debts or liquidated demands in money comprised in Order III. r. 6, a mere denial of the debt shall be inadmissible.” (Order XXI. r. 1.)

2. “In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact, *e.g.*, the drawing, making, endorsing, accepting, presenting, or notice of dishonour of the bill or note.” (R. 2.)

3. “In actions comprised in Order III. r. 6, clauses (A) and (B), a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed ; *e.g.*, in actions for goods bargained and sold, or sold and delivered, the defence must deny the order or contract, the delivery, and the amount claimed ; in an action for money had and received, it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff.” (R. 3.)

These rules are very explicit, and the pleader will have little difficulty in applying them in practice.

A further provision of Order XXI. is that, “if either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged

constitution of any partnership firm, he shall deny the same specifically." (R. 5.)

We have already seen that it is no longer necessary for a plaintiff to allege the performance of conditions precedent in his statement of claim. Such an averment is implied in every pleading ; but if the defendant intends to dispute the performance of any condition precedent he must distinctly specify in his statement of defence the condition in question, and say that it was not performed by the plaintiff. "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be)." (Order XIX. r. 14.)

Conditions precedent disputed to be specially denied.

So far attention has been directed to the cases where the defendant wishes merely to *deny* the allegations on which the plaintiff relies ; but, in addition to this, he may wish to set up *new facts* which would entitle him to a verdict, although the facts alleged by the plaintiff were really true. This he is entitled to do ; and in fact, if at the trial he means to rely on any facts which do not already appear in the pleadings in the action, he must specially set them out in his defence. "The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply (as the case may be) as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleading, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law or Statute of Frauds." (Order XIX. r. 15.) Where the defendant relies upon the Statute of Limitations or the Statute of Frauds, it would seem that it is now enough for him merely to allege that the debt was barred by the Statute of Limitations, naming it, or that such a section, naming it, of the Statute of Frauds has not been complied with. (Appendix D., Section 4, General Defences.) But in other cases he must briefly set out the new *facts* on which he relies to found his defence of release, illegality, or whatever it may be. It would not, for instance, be sufficient for a defendant to say that the contract sued on was

Defendant must aver new facts on which he means to rely.

Defendant
must aver
new facts
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he relies.

immoral without setting out facts to show how it was immoral, unless the alleged immorality of the contract appeared on the face of the statement of claim. Again, it would be hardly proper for the defendant to say "the defendant pleads a release." He should allege specifically that the cause of action was released on such a date by a deed. So in an action for libel the defendant must set out the facts on which he relies, either to show justification or privilege, and he is not entitled to prove either one or the other of these defences under a mere denial that the defendant wrote or published the libel maliciously. (*Belt v. Lauves*, 51 L. J. Q. B. 359.) On the same principle if a defendant in an action for libel relies, in mitigation of damages, upon the bad reputation of the plaintiff, he must in his statement of defence, specifically allege that the plaintiff was a person of bad reputation. (*Scott v. Sampson*, 8 Q. B. D. 491 ; 51 L. J. Q. B. 380 ; 46 L. T. 412 ; 30 W. R. 541.)

The defendant, in setting out the facts upon which he relies, must set them out concisely, and with a due regard to the rules already given directed against prolixity of statement. In *Heap v. Morris* (46 L. J. Q. B. 761 ; 2 Q. B. Div. 630), the Court, under the particular circumstances before it, refused to strike out a statement of defence which was very prolix ; but under the powers given to the taxing officer by Order XIX. r. 2, the defendant, in such a case, would be liable to pay all the costs occasioned by the prolixity.

Pleading
defences
which arise
after
action.

A defendant may plead any ground of defence which arises after the plaintiff has brought his action. "Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for doing so has expired, may be raised by the defendant in his statement of defence, either alone, or jointly with other grounds of defence." (Order XXIV. r. 1.) "Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may . . . within eight days after such ground of defence has arisen, or at any subsequent time, by leave of the Court or a judge, deliver a further defence . . . setting forth the same." (R. 2.) "The plaintiff is entitled, when a defendant alleges a ground of defence which has arisen since the commencement of the action, to

deliver a confession of such defence, and sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a judge shall, either before or after the delivery of such confession, otherwise order." (R. 3.)

It is no longer necessary, nor indeed proper, for a defendant to deny that the plaintiff has suffered the damage claimed. A denial of damages is implied in every pleading. "No denial or defence shall be necessary as to damages claimed, or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted." (Order XXI. r. 4.)

Damages
not to be
denied.

"No plea or defence shall be pleaded in abatement." (Order XXI. r. 20.) But it was held by the House of Lords, in *Kendall v. Hamilton* (4 App. Cases 504; 48 L. J. C. P. 705; 41 L. T. 418; 28 W. R. 97), that the abolition of pleas in abatement does not take away the right of a defendant to insist upon his co-contractors being joined as defendants. The proper course for a defendant who desires a person jointly liable with him to be added to the action, is to apply at chambers under Order XVI. r. 11.

Pleas in
abatement
abolished.

Demurrers are now abolished. Every objection which formerly would have been taken by demurrer must now be stated in the defence, or must form the ground of a substantive application to the Court or a judge for an order striking out the statement of claim, defence, or reply, as the case may be, on the ground that it discloses no cause of action or defence.

Demurrers
abolished.

Order XXV. describes the proceedings in lieu of demurrer. Rule 1 forbids demurrers for the future, and, by rule 2, "Any party shall be entitled to raise, by his pleading, any point of law," and the same may either be disposed of by the Judge at the trial, or by consent of the parties, or by order of the Court on the application of either party it may be set down for hearing, and disposed of at any time before the trial. The point of law on which the party pleading relies must be stated in a short and compendious form, making one of the paragraphs of his pleading. Thus to an action upon a guarantee where the defendant wishes to take the objection that the consideration is a past one, he may plead, "The defendant will object that the guarantee discloses a past consideration on the face of it;" or, where in an action for slander the plaintiff is driven to rely for his cause of action upon special damage, the defendant may

Pleading a legal objection to the claim.

plead, "The defendant will object that the special damage stated is not sufficient in point of law to sustain the action." (Appendix E., Section III.)

It would seem, however, that pleading the objection in law is not the only course open to a party who has a valid legal objection to the whole of the pleading of his opponent.

By Order XXV. r. 4, "The Court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or defence, or in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just ;" but it is provided by the next rule. "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not." (R. 5.)

The Defence when settled must be signed by counsel.

How an evasive defence may be accepted to.

There are several courses open to a plaintiff who wishes to take exception to a defence on the ground that it discloses no answer, or an evasive answer to the statement of claim.

1. He may proceed under Order XXV. r. 5, by summons at Chambers, and apply to have the defence struck out, on the ground that it discloses no reasonable answer. 2. He may raise by his pleading the point of law on which he means to rely, and either apply to have the case set down for argument forthwith, or avail himself of the objection at the trial. 3. He may, when the defence is embarrassing, apply at any stage for an order that the whole pleading or the objectionable part may be struck out. (Order XIX. r. 27.) 4. Or treating the evasive answer as no answer, he may forthwith apply to the Court for judgment upon admissions in the pleadings. 5. Another course is for the plaintiff to wait until the hearing, and then submit that the evasive denial is an admission, and object to the party pleading it adducing any evidence against such admission. (See *Thorp v. Holdsworth*, 3 Ch. D. 637 ; 45 L. J. Ch. 406 ; *Byrd v. Nunn*, 7 Ch. D. 284 ; 47 L. J. Ch. 1 ; 37 L. T. 585 ; 26 W. R. 110 ; *Tildesley v. Harper*, 7 Ch. D. 403 ; 47 L. J. Ch. 263 ; 38 L. T. 60 ; 26 W. R. 263.)

SECTION III.—COUNTER-CLAIM.

On the subject of counter-claims there are two questions that call for consideration—1st. When may a defendant plead a counter-claim, and of what nature may it be? 2nd. In what form, and with regard to what rules of pleading should it be pleaded?

1st. *When a counter-claim can be pleaded.*—By rule 3 of Order XIX., “A defendant in an action may set-off or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both in the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.” These words are general in their terms, and there can be no doubt that they give a defendant the right of counter-claiming against the plaintiff in respect of a matter which has no connection with the subject-matter of the original action, subject to the power vested in the Court to strike out the counter-claim, where the trial of the action would be embarrassed by retaining it. There are many cases where the Court has acted upon this power. (*Rotherham v. Prest*, 49 L. J. C. P. 104; 41 L. T. 558; 28 W. R. 277; *Fitzgerald v. Day*, 6 L. J. Ir. 326; *Hildige v. Farrall*, 8 L. R. Ir. 158 (C. A.); *Gray v. Webb*, 21 Ch. D. 802; 51 L. J. Ch. 815; 46 L. T. 815; 31 W. R. 87.) But the general rule is that stated by Kay, J., in the last case, viz., that a counter-claim may be brought on *any* cause of action against the plaintiff *in the same character*. The counter-claim against the plaintiff must be against him in the same character as that in which he sued in the original action. Thus where a plaintiff sued in his own right, a counter-claim against him in his representative capacity as executor was

There may be counter-claim in respect of any matter.

Proviso to this rule.

struck out. (*Macdonald v. Carington*, 4 C. P. D. 28 ; 48 L. J. C. P. 178 ; 39 L. T. 426 ; 27 W. R. 153.)

Defendant
may
counter-
claim
against
third
parties.

But the right of the defendant is not limited to counter-claiming against the plaintiff alone. He may, under certain stringent limitations, even bring in third parties as defendants to his counter-claim, and seek relief against them and the plaintiff jointly, or alternatively against the plaintiff or them. By Order XXI. r. 11 : "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff ;" and by rule 15 : "Where a defendant sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim, contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply, apply to the Court or a judge for an order that such counter-claim may be excluded, and the Court or a judge may, on the hearing of such application, make such order as shall be just."

It was intimated by Blackburn, J., in *Troleven v. Bray* (1 Ch. D. 176 ; 45 L. J. Ch. 113 ; 33 L. T. 827 ; 24 W. R. 198), that a defendant cannot counter-claim against a third party between whom and the plaintiff no relation exists ; and in *Turner v. Hednesford Gas Co.*, 47 L. J. Exch. 296 ; 3 Ex. Div. 145 ; 38 L. T. 8 ; 26 W. R. 308), Brett, L.J., quoted this *dictum* with approval.

The case last mentioned is the leading authority as to the circumstances under which a defendant can counter-claim against a third person. In that case the statement of claim alleged that the defendants had refused to allow the plaintiff to complete certain works which he had commenced pursuant to a contract made between him and them, and claimed damages for such refusal. The defence alleged that the defendants were entitled by the provisions of the contract to take the works out

of the hands of the plaintiff, if he should fail to construct them to the approval of their engineer; that the plaintiff had so made default, and they had therefore taken the works into their own hands. The defendants, by way of counter-claim, sought to recover from the plaintiff the expenses incurred by them owing to his default in not duly constructing the works pursuant to the contract, and in other paragraphs of the counter-claim they claimed to recover £200 from one Round (whom they made a party to the counter-claim) on a bond given by Round to the defendants, by which he had bound himself to be answerable to the defendants to the extent of £200 as surety for the proper execution by the plaintiff of the contract made between the plaintiff and the defendants to the satisfaction of the engineer of the defendants for the time being.

Counter-claim against third parties.

The defendants alleged the default of the plaintiff in not duly constructing the works as already mentioned, and claimed in consequence to recover damages from Round. Round took out a summons to exclude so much of the counter-claim as related to him, on the ground that it did not raise a question between the defendants and the plaintiff along with him, and the case ultimately came to the Court of Appeal.

In giving judgment, Brett, L. J., said: "Rule 5 of Order XXII. does not say that the cause of action must raise questions against the plaintiff along with others, but that where the counter-claim raises questions between the defendant and the plaintiff along with any other person, the defendant may bring in such person by counter-claim, that is to say, that where a counter-claim raises a question which, if the counter-claim had been an original action, could have been enforced against the plaintiff and any other person, then that such other person can be made a party to the suit by the delivery to that person, by the defendant, of his defence and counter-claim within the time and in the manner specified by the rules of Court. It is undoubtedly quite true, as was said by Blackburn, J., in *Trollewen v. Bray*, that there cannot be a counter-claim against a third party between whom and the plaintiff no relation exists; but it is also quite true, and indeed expressly provided, that wherever, by reason of some legal or equitable relation between the parties, certain facts are disclosed which raise a question

Turner v. Hednesford Co.

Counter-
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between the plaintiff and the defendant, and where these facts if true form the ground of a good counter-claim by the defendant against the plaintiff, then if these same facts also raise a question between the defendant and a third person, that third person may be made a defendant to the counter-claim delivered by the defendant to the original suit, and this too even though the third person could not have been made a party to the action as originally brought by the plaintiff. Now in this counter-claim the defendants have raised a question which gives them a good answer to the claim of the plaintiff, and it further shows that they have a right to relief against Round—a right which arises out of the same facts as those which form the foundation of the contention between them and the plaintiff. There is therefore a question in litigation between the plaintiff and the defendants which would also be a question between the defendants and Round. The bond indeed on which the defendants claim to recover from Round is not one to which the plaintiff is a party; but there is an equitable relation between all the three, for Round is surety for the plaintiff, and is thereby liable to a certain extent to the defendants for the performance by the plaintiff of his agreement. The same question, therefore, interests all these parties. The surety Round is not liable until the plaintiff breaks the contract, and that which gives the defendant a right to counter-claim against the plaintiff is the breach by the plaintiff of his contract, so that there is a relation between the parties of a sufficiently intimate character to enable Round to be made a party to this suit. Where the litigation is really common litigation arising out of a subject common to all the parties attempted to be brought into the suit, I am of opinion that we should give these rules full and free operation in order that the intention of the statute may prevail, and that one litigation may include and conclude all those parties between whom there is really one and the same question in issue." See also *Warner v. Twining*, 24 W. R. 536; *Furness v. Booth*, 4 Ch. D. 586; 46 L. J. Ch. 112; 25 W. R. 267; *Harris v. Gamble*, 6 Ch. D. 748; 46 L. J. Ch. 768; *Barber v. Blaisberg*, 19 Ch. D. 473; 51 L. J. Ch. 509; 56 L. T. 52.

There may
be counter-
claim
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A defendant may have a counter-claim although he admits the plaintiff's claim, and in the *Mersey Steamship Company v. Shuttleworth & Co.*, 11 Q. B. D. 531, where in an action for

a liquidated demand the defendants pleaded admitting the claim but setting up a counter-claim for unliquidated damages to a greater amount, the Court of Appeal refused to give the plaintiff judgment upon his claim and to order the amount to be brought into Court to abide the event of the counter-claim. "A plaintiff," said Cotton, L. J., "is not entitled to have the money paid into Court unless the counter-claim is frivolous and unsubstantial."

claim
admitted.

It is no objection to a counter-claim that it exceeds in amount the claim in the original action. Rule 17 of Order XXI. says: "Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

Counter-
claim may
exceed
amount of
claim.

Neither is it any objection to the counter-claim that it amounts to less than the claim. This question arose in *Mostyn v. West Mostyn Company* (1 C. P. D. 145; 45 L. J. C. P. 401). In giving judgment Brett, J., said: "Supposing the counter-claim to show a right to some damages, but that it is obvious that the amount of such damages would not be equal to the amount of the claim to which it is pleaded, would it be demurrable? If it is to be treated as a set-off under the old system, it is clear that it would, for a plea of set-off pleaded to the whole of the claim, alleged that the set-off was of an amount equal to the claim. I think, however, that the 3rd rule of Order XIX. shows that a counter-claim is not like a plea of set-off, for by that rule the counter-claim is to have the same effect as a statement of claim in a cross action. The meaning seems to be, that where there is a claim and a counter-claim, the effect shall be similar to the effect under the old system where the parties agreed that cross actions should be tried together, and judgments having been given, there should be execution only for the balance of one judgment over the other, except that under the new system the judgment is only to be for the balance of one claim over the other. If so, the counter-claim will be good if it shows a right to any amount of damages whatever, and no question arises as to whether the amount of the counter-claim equals the amount of the claim. Therefore, where there is

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a demurrer to the whole of a statement of defence, if such statement shows a good counter-claim for any amount, the demurrer must fail, and the statement of defence stand good." And the decision was that a counter-claim, being in the nature of a cross action, may be good although it does not cover the whole of the plaintiff's claim.

Counter-claim in respect of cause of action after writ.

Whether a counter-claim can be brought in respect of a cause of action arising after the issue of the writ in the original action is still open to doubt, although the better opinion seems to be that it may. Jessel, M. R., in the *Original Hartlepool Collieries Company v. Gibb* (6 Ch. D. 713; 46 L. J. Ch. 311; 36 L. T. 433) decided in the negative; but Fry, J., in the later case of *Beddall v. Maitland* (17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 248), upon a review of all the authorities, came to the conclusion that a defendant may counter-claim for a cause of action which has arisen after the writ, and his lordship's view would seem to be borne out by the dicta of the Court of Appeal in *Ellis v. Munson* (35 L. T. 585), and by the *ratio decidendi* of *McGowan v. Middleton* (11 Q. B. D. 464).

It has been decided that, if two or more persons sue together as plaintiffs, the defendant can counter-claim against them singly. (*Manchester, Sheffield, and Lincolnshire Railway Company v. Brooks*, 2 Ex. D. 243; 46 L. J. Exch. 244; 36 L. T. 103; 25 W. R. 413.) There, two railway companies, as joint lessees of a railway, sued for statutory tolls, and the defendant set up against each company separate counter-claims for damages in respect of delay in the delivery of goods. The plaintiffs applied to have the counter-claims struck out; but first Grove, J., at chambers, and then the Court on appeal, refused the application.

Can a third party counter-claim against the defendant?

Can a third party, who is brought in by a defendant, counter-claim against the defendant? In *Street v. Gover* (2 Q. B. D. 498; 46 L. J. Q. B. 582; 36 L. T. 766; 25 W. R. 750) it was decided in the negative; but in the later case of *Toke v. Andrews* (4 Q. B. D. 428; 51 L. J. Q. B. 281; 30 W. R. 659) doubts were thrown upon this decision, and it was decided that a plaintiff, in his reply, might counter-claim against the defendant's counter-claim in respect of a cause of action which arose after the issue of the writ but before the defence and counter-claim was delivered.

The Form of the Counter-claim.—The defence and counter-claim are combined in the same document, which ought to be headed "Defence and Counter-claim." In the forms given in the Appendix there is a sub-head, "Defence," under which the paragraphs relating exclusively to the defence are given; and then another sub-head, "Counter-claim," under which the facts which support the counter-claim are ranged in numbered paragraphs. But though "defence" and "counter-claim" are thus combined in the same document, it must be borne in mind that they are distinct pleadings, and there must be in the body of each the allegations of fact essential to support it.

The form of the counter-claim.

It is now well settled that a defendant cannot, for the purposes of his counter-claim, rely upon the facts stated in the defence, unless those facts are repeated in the body of the counter-claim, or, which is the preferable course, expressly incorporated by apt words in the latter.

Facts in defence only available for counter-claim if incorporated.

This was first decided in *Holloway v. York* (25 W. R. 627). There the trustee in liquidation of the affairs of a person who had contracted to purchase real estate sued the vendor for a return of the deposit-money paid by the debtor, alleging that the latter had, before his liquidation, rescinded the contract, on the ground of the vendor's want of title. The defendant delivered a defence and also a counter-claim, asking specific performance of the contract by the plaintiff. The counter-claim did not state the contract (which was set out in the statement of claim), but mentioned it as "the said agreement;" nor did it appear in the counter-claim at all, except perhaps by the title, that the plaintiff was the trustee in liquidation. The plaintiff demurred to the counter-claim generally, on the ground of want of equity; but during the argument of the demurrer, the Master of the Rolls commented on the form of the counter-claim. He pointed out that no facts were pleaded in the counter-claim sufficient to support it. In the counter-claim the defendant did not state the liquidation proceedings, nor that the plaintiff was a trustee, nor did he set out the agreement for sale. It had been said that he might refer to the title to discover the plaintiff's status, and to the statement of claim for the form of the agreement; but considering Order XIX., r. 8, he did not think he could do this; in his opinion

Facts in defence only available for counter-claim if incorporated.

the statement of the facts must be contained in the body of the counter-claim.

Crowe v. Barnicott (L. R. 6 Ch. D. 753 ; 46 L. J. Ch. 855 ; 37 L. T. 68 ; 25 W. R. 789) was an action of ejectment for breach of a covenant in a lease to repair the demised premises. The defendants Barnicott and Isett, who were the lessees from the plaintiffs, agreed to sublet the premises to the defendant Timewell, subject to their obtaining the consent of the plaintiffs. Before this consent had been obtained, Timewell, without the knowledge of the other defendants, got into possession of the premises, and commenced pulling down and converting them into a skating rink. As soon as the plaintiffs became aware of this, the action was commenced claiming possession of the premises, damages from Barnicott and Isett for breach of covenant, and an injunction against Timewell. Timewell delivered a defence and counter-claim headed, "Statement of Defence and Counter-claim of the Defendant A. T. Timewell." It consisted of fourteen paragraphs, numbered consecutively. The first thirteen paragraphs contained a statement of the facts, on which the defendant relied by way of defence, but made no reference to a counter-claim. Among other things, there was a statement that the defendant had entered into a covenant for the erection of iron buildings on the demised premises at a cost of £1500, and that he had already laid out £500 on the premises. Paragraph 14 followed immediately after paragraph 13, without any distinction, and was in these words: "This defendant, by way of counter-claim, claims to be paid by the plaintiffs, and the defendants Barnicott and Isett, damages for the loss he has sustained in consequence of his expenditure aforesaid upon the said premises to the amount of £1500, and he claims interest on such sum." At the trial, objection was taken that there was no statement of facts in the body of the counter-claim to support it. It was replied, on the other side, that as the defence and counter-claim were one document, it was sufficient if the facts relied on were stated once, either in the defence or the counter-claim.

In giving judgment, Fry, J., said ; "I am of opinion that this preliminary objection is a valid one. It is quite plain that paragraph 14 of the document refers to that which has gone before, and if you do not read that, you do not know what

paragraph 14 means. There can be no doubt that in that paragraph itself there is no specific statement of the facts upon which the defendant relies for the relief which he claims. The rules bearing on the subject are rules 3 and 10 of Order XIX. [His Lordship read them.] The 10th rule, in my opinion, means that the defendant must state specifically in his counter-claim, or as the Master of the Rolls expressed it in *Holloway v. York*, in the body of the counter-claim, the facts upon which he relies for relief. A counter-claim is intended as a substitute for a cross-bill, and therefore the facts upon which reliance is placed should appear in the counter-claim itself. If paragraph 14 alone is looked at, it is not disputed that the facts relied on do not appear. But it is said that the whole document is a defence and counter-claim, that it is an amalgamation of the two things, that the whole of it must be looked at together. I think that such a mode of pleading is not sanctioned by the rules, and that it would be highly inconvenient. If it were permitted, the result would be that in every case of a counter-claim the pleader would omit to state the specific facts upon which he relies by way of counter-claim, and would take his chance of picking them out of the statement of defence at the trial."

Facts in defence only available for counter-claim if incorporated.

In the later case of *The Birmingham Estates Company v. Smith* (13 Ch. D. 506; 49 L. J. Ch. 251; 42 L. T. 111; 28 W. R. 666), the authorities on the subject were reviewed by Jessel, M. R., and the rule laid down that in a counter-claim a defendant may refer to statements of facts in the pleadings on which he intends to rely, without setting them out again in full. In this case the plaintiffs' company brought an action to set aside a deed under which they were liable to pay a large sum of money. The defendant put in a statement of defence and counter-claim. The facts on which the defendant relied were set out in detail in the statement of defence. The counter-claim was in the following words :—"By way of counter-claim the defendant refers to the indenture of the 26th of June, 1876, in the pleadings mentioned, and to the 16th and 20th paragraphs of the statement of defence ;" and then followed the prayer of the counter-claim. It was objected, upon the authority of *Holloway v. York*, and *Crowe v. Barnicott*, that the counter-claim was insufficiently pleaded.

Facts in defence only available for the counter-claim if incorporated.

In giving judgment, Jessel, M. R., said :—"Then the plaintiff company object to the counter-claim, not because this is not a proper subject of counter-claim, which is a new objection, but because they say the defendant has no right to such relief, and he has not properly referred to the facts. Now, I did not decide, in *Holloway v. York*, that a counter-claim should do any more than state the facts properly on which the counter-claim was founded. I did not decide that they were to be stated all over again. A defendant bringing a counter-claim may say : 'I rely on the facts stated in the 3rd, 4th, and 5th paragraphs of the statement of claim, and the 7th, 9th, and 11th paragraphs of the statement of defence.' He need not print them all over again ; it is quite enough if he refers to them, and bases his counter-claim on the facts therein stated. That is what the defendant has done. He refers to the indenture of the 26th of June, 1876, 'in the pleadings mentioned,' and to certain paragraphs in the statement of defence, which is a very good and cheap way of stating his case, much better than setting it all out again ; and then he counter-claims in the alternative for what he certainly would have been entitled to if he had not got judgment in the common law action, namely, for the money due to him under the indenture. That alternative would be the subject of demurrer, rather than of a motion to strike it out ; but I think, looking at what has occurred, the right order to make is to strike out the counter-claim, and to make the costs costs in the action." See also *Lees v. Patterson* (7 Ch. D. 866 ; 47 L. J. Ch. 616 ; 38 L. T. 451 ; 26 W. R. 399).

It may be taken now as well settled that when the facts which support the counter-claim have already appeared in the defence, the proper course is for the defendant to incorporate them in the counter-claim by some general words, such as "the defendant repeats the allegations contained in paragraphs . . . of the defence ;" or "the defendant refers to the allegations in paragraphs . . . of the defence." When the facts on which the defendant relies do not appear in the defence, as will generally be the case, he must then state them in the body of the counter-claim, with such particularity as may be necessary, but bearing in mind the rules against prolixity. A counter-claim is a statement of claim in a

cross action ; and all the principles which have been laid down with regard to pleading facts in a statement of claim apply to the counter-claim.

SECTION IV.—REPLY.

The substance and form of the plaintiff's reply vary with the nature and form of the defence, and will differ accordingly as—(1st) The defendant in his defence has merely denied the allegations in the claim, or set out new facts which the plaintiff in his turn *merely wishes to deny* ; or (2nd) the defendant having set out new facts in his defence, the plaintiff wishes to set out new facts in answer ; or (3rd) where the defendant has pleaded a counter-claim.

1. In the cases which fall within the first of these three classes, the plaintiff's course is very simple. In his reply he merely joins issue on the defence, or availing himself of Order XXVII., r. 13, he delivers no further pleading. In that case, "if the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue." Having told his own story once, the plaintiff is not bound to deal with each allegation in the defence, and it makes no difference that the defendant has introduced new facts into the case. The plaintiff need not deal specifically with them, but by a general joinder of issue he puts the defendant to proof of them. Rule 18 of Order XIX. expressly confers upon a plaintiff this right. It says : "Subject to the last preceding rule (which refers to the case of a counter-claim, to be presently dealt with), the plaintiff by his reply may join issue upon the defence, and each party in his pleading (if any), subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted."

Reply
where
plaintiff
merely
denies
defence.

See also Order XXVII., r. 13, already quoted ; and *Williamson v. The London and North Western Railway Company*, 12 Ch. D. 787 ; 48 L. J. Ch. 559 ; 27 W. R. 724.

Reply
where
plaintiff
desires to
plead new
facts.

2. But where the defence is more than a mere denial of the statement of claim, and contains new facts, the plaintiff is entitled by his reply to specifically allege fresh facts in answer to them, provided that the fresh facts which he pleads are not inconsistent with those contained in the statement of claim. A plaintiff by his reply must not set up a new case or new claims. That can only be done, if at all, by amendment of the statement of claim. But, as we have already seen, in his claim he is not bound to anticipate the defence, and to allege facts to meet allegations which the defendant may make. (*Hall v. Eve*, quoted at pp. 46—49.) He can lie by until the defendant has pleaded his facts, and then suggest any new matter which affords an answer to them, provided always that it is not inconsistent with the case he made originally by his statement of claim. For instance, a plaintiff sues for damages caused by the personal negligence of the defendant. He has every reason to believe that the defendant will plead a release which he obtained by fraud. It would not be proper for the plaintiff in his statement of claim to allege that the defendant obtained a release from him by fraudulent misrepresentation. That would be anticipating a defence which possibly may not be set up. The proper course is for the plaintiff to briefly state his ground of action against the defendant, and when the latter in his defence pleads the release, to reply specially the fraud, which he contends invalidates it. In setting out the new facts on which he relies, the plaintiff must conform to the rules against prolixity, and must state them in as compendious a form as possible. (*Williamson v. The London and North Western Railway Company*, quoted *supra*.)

Reply to
counter-
claim.

3. The third case is where a defendant has pleaded a counter-claim against the plaintiff. It was decided upon the Rules of 1875 that where a defendant filed a counter-claim, the reply could not join issue upon it generally, but must deal specifically with each material allegation. (*Benbow v. Lou*, 13 Ch. D. 553 ; 49 L. J. Ch. 553 ; 42 L. T. 14 ; *Green v. Sevin*, 13 Ch. D. 589 ; 41 L. T. 724.) And now, by Order XXIII., r. 4, “where a counter-claim is pleaded, a reply thereto shall be

subject to the rules applicable to statements of defence." All the rules laid down in the last section as to framing defences apply therefore to a reply which is an answer to a counter-claim. So far as the reply is an answer to the defence merely, it will join issue, or plead new facts, or do both according to the principles stated in this section ; and so far as it is an answer to the counter-claim, it will follow the rules applicable to pleading defences. In *Hillman v. Mayhew* (24 W. R. 485), Jessel, M. R., decided that where a defendant does not plead facts in support of his counter-claim, the plaintiff may join issue upon it generally. The effect of this is only that where a counter-claim is not properly pleaded, you need not properly deny it.

Reply to counter-claim.

But, in addition to a reply by a plaintiff, there may be a reply by a third party, who has been brought into the action by the counter-claim of the defendant. It seems clear that this reply must be more than a joinder of issue. As between himself and the defendant who brings him into the action the defence and counter-claim of the latter must be regarded as a statement of claim, and, though his answer is called a reply, it is, in effect, a defence, and must conform to the rules which regulate defences.

Reply by a third party.

SECTION V.—JOINDER OF ISSUE.

"No pleading subsequent to reply other than a joinder of issue shall be pleaded without the leave of the Court or a judge, and then shall be pleaded only upon such terms as the Court or judge shall think fit." (Order XXIII., r. 2.) Where there is no counter-claim, and the plaintiff does not wish to set up any new facts, the reply is, properly, only a joinder of issue, or it would seem the party may take advantage of Order XXVII., r. 13, and deliver no pleading at all. But, where there is a counter-claim, the allegations in which must necessarily be specifically dealt with, or where the plaintiff wishes to set up new facts, the reply is more than a joinder of issue, and in that case a further pleading is necessary. Such further pleading *must* only be a joinder of issue, unless leave has been obtained to plead anything in addition. The cases will be rare where it

Where a pleading beyond reply necessary-

is either necessary or desirable to do more than join issue upon a reply, though no doubt they will, from time to time, arise in practice.

SECTION VI.—AMENDMENT OF PLEADINGS.

In certain cases a party may amend his pleading without the leave of the Court or a judge : in other cases he requires such leave.

When a party has a right to amend.

By Order XXVIII., r. 2, a plaintiff may, *without leave*, amend his statement of claim once at any time before the expiration of the time limited for reply, and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared. And by rule 3 of the same order a defendant who has set up any set-off or counter-claim may, without leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for answering the reply, and before such answer, or, in case there be no reply, then at any time before the expiration of twenty-eight days from defence. The costs occasioned by amendments under either of the above rules are to be borne by the party making the amendment (Order XXVIII., r. 13) ; and, where any pleading has been amended, the opposite party may, within eight days, apply to the Court or a judge to disallow the amendment, or any part thereof, and the Court or a judge, if satisfied that the justice of the case requires it, may disallow the amendment, or allow it subject to such terms as to costs as may be just.

Practically unlimited power of Court to authorise amendments.

The power of amending pleadings as of right, and without the necessity of any application in chambers, is limited to the two cases given above. In other circumstances no amendment can be made without the leave of the Court or a judge being first obtained. But the power which the latter have to authorise amendments is practically unlimited. "In all cases not provided for by the preceding rules of this Order, application for leave to amend may be made by either party to the Court or a judge, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just." (Order XXVIII., r. 6.)

It has been suggested that where a judge of first instance

has refused to authorise an amendment of the pleadings, the Court of Appeal will not review this exercise of his discretion (*Golding v. Wharton Salt Works Company*, 1 Q. B. D. 374; 34 L. T. 474; 24 W. R. 423; *Watson v. Rodwell*, 3 Ch. D. 380; 45 L. J. Ch. 744; 35 L. T. 86; 24 W. R. 1009); but in *Laird v. Briggs* (19 Ch. D. 21) Jessel, M. R., pointed out that the effect of these decisions was only that the Court of Appeal would not interfere in a trivial matter.

In *Tildesley v. Harper* (10 Ch. D. 393; 48 L. J. Ch. 495; 39 L. T. 552; 27 W. R. 249), where Fry, J., refused a defendant who had pleaded an evasive denial leave to amend, the Court of Appeal decided that an amendment ought to be allowed, and Bramwell, L. J., laid down that, as a general rule, leave to amend ought not to be refused unless the Court is satisfied that the party applying is acting *malâ fide*, or that his blunder has done some injury to the other side which cannot be compensated by payment of costs or otherwise. See also *Rutter v. Tregent* (12 Ch. D. 758; 41 L. T. 16; 27 W. R. 902; 48 L. J. Ch. 791), *Blenkhorn v. Penrose* (43 L. T. 668; 29 W. R. 37). In *Hendriks v. Montagu* (17 Ch. D. 642; 50 L. J. Ch. 257; 44 L. T. 89) Jessel, M. R., intimated that, as a rule amendments are not to be allowed at the trial which raise charges of fraud, where the case was originally launched without any charge of fraud.

COMMENCEMENTS AND TERMINATIONS OF PLEADINGS (a).

Ordinary
form of
commence-
ments, &c.,
of plead-
ings.

Ordinary Form of Commencement and Termination of a State- ment of Claim.

In the High Court of Justice,
Division.

187—. No. .
[Here add according to
the figure and number
on writ.]

Writ issued. [Here fill in date.]

Between Sir (b) John Jones . . . Plaintiff,
and

Edward Smith . . . Defendant.

Statement of Claim.

1, 2, &c. [Here insert the body of the pleading.]

The plaintiff claims [the particular prayer or claim follows].

Place of Trial (c).

Signed (*Here counsel signs*).

Delivered this — day of — 188—, by
Messrs. E—— and R——, — St., in
the City of London, plaintiff's solicitors,
or, the plaintiff in person.

Order XIX.
r. 7.

(a) The rule of the new practice which regulates the formal part of all pleadings is Order XIX., r. 11. "Every pleading shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, the reference to the letter and number of the action, the Division to which the judge, if any, to whom the action is assigned belongs, the title of the action, and the description of the pleading, and shall be indorsed with the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same, if he does not act by a solicitor."

Pleadings
to be de-
livered.

Pleadings are not filed under the new system, but delivered *in the first instance*, between the solicitors of the parties. "Every pleading . . . shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered by any party, then such pleading shall be delivered by being filed with the proper officer" (Order XIX., r. 10); but by Order XXXVI., r. 30, "the party entering the trial shall deliver to the proper officer two copies of the whole of the pleadings in the action, one of which shall be for the use of the judge." and by Order XIX., r. 9, "every pleading which shall contain less than ten folios (every figure being counted as one word) may be either printed or written, or partly written and partly printed, and every

When
pleadings
to be,
printed.

other pleading, not being a petition or summons," below that may be either in writing or print at the option of the party.

A plaintiff, unless he obtains an extension of time, must deliver a statement of claim within five weeks after the defendant gives notice requiring it (Order XX., r. 1); but it is not necessary that the plaintiff should deliver a statement of claim at all in cases where the defendant has intimated that he does not require one. Still, in such a case, the plaintiff may insist on delivering his statement of claim, but it is at his own risk, so far as costs are concerned, for "where a plaintiff delivers a statement of claim without being required to do so, or the defendant unnecessarily requires such statement, the Court or a judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper." (Order XX., r. 1.)

Time for delivering statement of claim.

The time within which pleadings must be delivered varies, it will be seen, with the different pleadings; but in counting time the following rules are common to statements of claim and defence, and to replies, viz., that "no pleading shall be . . . delivered in the long vacation unless directed by a Court or a judge" (Order LXIV., r. 4); "and the time of the long vacation shall not be reckoned in the computation of the times appointed, or allowed by these rules . . . for delivering any pleading unless otherwise directed by the Court or a judge." (Order LXIV., r. 5.) Again, by rule 2 of the same order, "where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time.

Rules as to computation of time for delivering pleadings generally.

Unlimited power of extending the time is vested in the Court. The general rule upon the subject is rule 7 of Order LXIV. "The Court or a judge shall have power to enlarge or abridge the time appointed by these rules or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed;" and by rule 24 of Order LXV. "the costs of applications to extend the time for taking any proceedings shall be in the discretion of the taxing officer, unless the Court or judge shall have specially directed how the costs are to be paid or borne. The taxing officer shall not allow the costs of more than one extension of time, unless he is satisfied that such extension was necessary, and could not, with due diligence, have been avoided."

The effect of not pleading in due time, where no extension of time has been obtained, differs according as it is the plaintiff or the defendant who is in default in delivering a pleading. "If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may at the expiration of that time apply to the Court or a judge to dismiss the action with costs for want of prosecution; and on the hearing of such application the Court or judge may, if no statement of claim shall have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as the Court or judge shall think just." (Order XXVII., r. 1.) This is where the plaintiff has made default in delivering a statement of claim, but if a statement of claim is duly delivered, and the defendant duly delivers a defence, and then the plaintiff makes default in delivering a reply, rule 13 of Order XXVII. applies. If the plaintiff does not deliver a reply . . . within the period allowed for that purpose, the material facts stated in the defence shall be deemed to be denied. When it is the defendant that makes default in pleading, the case must be distinguished where the

Power of Court or judge to extend time.

Effect of default of plaintiff in delivering pleading within time.

Effect of
default in
case of
defendant.

plaintiff's claim is for—(a.) a debt or liquidated demand; (b.) detention of goods and pecuniary damages or either of them; (c.) the recovery of land; (d.) mesne profits, arrears of rent, or damages for breach of contract indorsed upon a writ for the recovery of land; (e.) all other actions. In cases (a.) and (c.) the plaintiff may sign final judgment with costs; in cases (b.) and (d.), the plaintiff may enter an interlocutory judgment against the defendant, and a writ of inquiry shall issue to assess the value of the goods, or the amount of profits as the case may be; in all other cases the plaintiff does not get judgment forthwith, but he may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to. (Order XXVII., rr. 8 and 11.) If there are several defendants, and some make default in pleading and others duly plead, the plaintiff may enter final judgment at once, and proceed to execution against those in default, or set down the action on motion for judgment against the defaulting defendants, according to the nature of the claim which the plaintiff has made in his writ.

(b) Where a party has any title or dignity, it ought to be given to him both in the writ and in the pleading, as the Duke of —, the Marquis of —, the Earl of —, the Right Honourable —, the Right Reverend Father in God —, Lord Bishop of —, Sir —, Bart., Sir —, Knight; but this does not apply to special orders of knighthood or decorations, such as K.C.B., &c. A mere addition such as Mr. or Esquire is not given.

Local venue
abolished.

(c) The Judicature Acts made an important change in the law as to *venue* or the place of trial. Previously all actions were divided into local and transitory. The former—all actions relating to land, as ejectment, trespass, &c.—could, unless by special order, only be tried in the county where the land was situated, and the plaintiff had therefore really no choice as to the place of trial; but in the case of transitory actions it was otherwise. Here the plaintiff could fix the *venue* himself, and thus an action for libel published in Westmoreland could be tried in London. Now this right of selecting the place of trial is given to the plaintiff in every class of case. This is done by Order XXXVI., r. 1, which provides: "There shall be no local *venue* for the trial of any action except where otherwise provided by statute. Every action in every division shall, unless the Court or judge otherwise order, be held in the county or place named on the statement of claim, or, where no statement of claim has been delivered or required, by a notice in writing to be served on the defendant or his solicitor within six days after appearance. Where no place of trial is named, the place of trial shall, unless the Court or a judge otherwise orders, be the county of Middlesex." This rule is of the most sweeping character, and it has been construed as giving the plaintiff a right to fix the place of trial subject to the defendant showing such a preponderance of convenience in trying elsewhere as to oust that right. (Per Denman, J., *Plum v. Normanton Iron, &c.*, (n.), W. N. 1876, 105; 20 S. J. 340.) But, in practice, the plaintiff's right is much qualified by considerations of convenience and economy.

Ordinary Form of Commencement and Termination of Statement of Defence (a).

In the High Court of Justice, Division. Between John Jones Plaintiff, and Edward Smith and William Smith . . Defendants. Defence.	188—. No. .	[<i>Here add according to the number and figure on the writ.</i>] Ordinary form of commencement, &c., of defence.
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The defendants say that—

1. { [*Here insert the paragraphs containing the body of*
2, &c. { *the pleading.*]

(Signed) [*Here counsel signs*].

Delivered this — day of — 188—, by
Messrs. , — St., in the City of
 , agents for
 , defendants' solicitor.

Ordinary Form of Commencement and Termination of a Statement of Defence and Counter-claim.

In the High Court of Justice, Division. Between Sir John Fletcher, Bart. (b) Plaintiff, and Edward Smith Defendant. Defence.	188—. No. .	[<i>Here add according to the number and figure on the writ.</i>] Ordinary form of commencement, &c. of defence and counter-claim.
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The defendant says that :

1. { [*Here insert body of statement of defence.*]
2, &c. }

(a) "Where a statement of claim is delivered to a defendant, he shall deliver his defence within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a judge." (Order XXI. r. 6.) See *ante*, pp. 95, 96, as to computation of time, power of Court or judge to extend the time, and effect of defendant making default in pleading.

(b) See *ante*, p. 96, as to giving titles or dignities to plaintiff or defendant.

Counter-claim.

The defendant says that :

1. } [Here insert body of counter-claim.]
2. }

(Signed) [Here counsel signs.]

Delivered (a) this — day of — 188—, by
&c., &c.

*Form of Commencement and Termination of a Statement of
Defence and Counter-claim, where additional Party or
Parties added to the Counter-claim (b).*

Form
where
defendant
added to
plaintiff on
counter-
claim.

In the High Court of Justice,
Division.

188—. No. .

[Here add according to
the number and figure
on the writ.]

Between Sir John Jones Plaintiff,

and

Edward Smith Defendant.

(By original action.)

And between Edward Smith Plaintiff,

and

The above-named Sir John Jones, and Henry
Wood, John Harvey and John Jex . Defendants.

(By counter-claim.)

Defence.

The defendant, Edward Smith, says that :

1. }
 2. }
- [Here insert body of statement of defence.]

Rule where
third
party
added as
defendant
with plain-
tiff on
counter-
claim.

(a) See notes on preceding pages as to this portion of the pleading.
(b) "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff." (Order XXII. r. 11.)

Counter-claim.

The defendant, Edward Smith, says that :

1. } [*Here insert body of counter-claim.*]
 2. }
- (Signed) [*Here counsel signs.*]
- Delivered, &c., &c.

Form
where de-
fendant
adds a
third
party in
counter-
claim.

*Ordinary Form of Commencement and Termination of
a Reply.*

188—. No. .

In the High Court of Justice,
Division.

Form of
reply.

Between Sir John Jones . . . Plaintiff,
and
Edward Smith . . . Defendant.

Reply.

The plaintiff as to the defence says that :

1. }
2. } [*Here insert the body of the pleading.*]
3. }

(Signed) [*Here counsel signs.*]

Delivered the — day of — 18—, by
&c., &c.

*Form of Commencement and Termination of a Reply, where a
Counter-claim has been added.*

1883. A. No. 100.

In the High Court of Justice,
Division.

Between A. B. . . . Plaintiff,
and
X. Y. . . . Defendant.

Reply.

The plaintiff as to the defence says that :

1. [*Here insert pleading.*]

The plaintiff as to the counter-claims says that :

1. [*Here insert pleading.*]

(Signed) [*Here counsel signs.*]

Delivered the — day of — 18—, by
&c., &c.

*Form of Commencement and Termination of a Rejoinder, where
there is a Counter-claim.*

1883. A. No. 100.

Form of
commence-
ment, &c.,
of re-
joinder.

In the High Court of Justice,
Division.

Between A. B. Plaintiff,

and

C. D. Defendant.

Rejoinder.

The defendant as to the reply says that :

1. [*Here insert pleading.*]

(Signed) [*Here counsel signs.*]

Delivered the — day of — 18—, by
&c., &c.

Pleadings will be commenced and ended according to one or other of the above forms, subject, however, to variation in a number of cases so far as some description of one or other of the parties named is concerned. It will be convenient here to mention some of the variations most frequent in practice:—

Where
plaintiff or
defendant
erroneously
described
in writ.

Where a plaintiff or defendant has been described in the writ of summons by a wrong name, the commencement of the statement of claim will be varied thus: "Between J. J. (erroneously named in the writ as H. J.), plaintiff, and H. S., defendant," or, "Between J. J., plaintiff, and H. S. (sued as J. S.), defendant."

Where a surviving plaintiff is claiming, the other having died after writ issued, the variation will run, "Between J. J.

(suing together with A. B., since deceased), plaintiff, and H. S. defendant."

Where either party is an executor or administrator, and sues, or is sued, in that capacity, the variation will run, "Between J. J. (executor of the last will of A. B., deceased, or administrator of the personal estate of A. B., deceased, as the case may be), plaintiff, and H. S., defendant," or "Between J. J. plaintiff, and H. S. (executor of the last will of A. B., deceased, or administrator of the personal estate of A. B., deceased, as the case may be), defendant."

Where executor or administrator a party.

Where the executor or administrator of a party who has died after the issuing of the writ is claiming, or is a defendant, the variation will run, "Between J. J. (executor of the last will of A. B., deceased since the issuing of the writ in this action, and substituted as plaintiff by order of Master —), or (administrator of the personal estate of A. B., deceased, &c., &c.), plaintiff, and H. S., defendant," or, "Between J. J., plaintiff, and H. S. (executor of the last will of A. B., deceased, since the issuing of the writ in this action, and substituted as defendant by order of Master —, or administrator of the personal estate of A. B., deceased, &c., &c.), defendant" (a).

Where either party an executor or administrator of party deceased since writ issued.

(a) As to the rights of an executor or administrator to sue upon contracts made with the testator or intestate, and in respect of wrongs done to his estate, and their liability to be sued for breaches of contracts and torts committed by him, see *post*, title Executors. In this place attention is directed to the Orders of Court which prescribe the steps to be taken to join a personal representative in cases where he has a right or is liable to be joined. Order XVII. r. 1 lays down generally, "A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*." Rule 2 goes on, "In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party, be made a party, or be served with notice thereof in such manner and form as is herein-after prescribed, and on such terms as the Court or judge shall think just, and shall make such order for the disposal of the cause or matter as may be just." Rule 4 is perhaps the most important: "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or any person already a party should be made a party in another capacity, an order that the proceedings shall be

Changes in interest through marriage, death, bankruptcy, &c., *pendente lite*.

Where either party an administrator during minority of an executor.	Where an administrator during the minority of an executor is plaintiff or defendant, it will run, "Between J. J. (administrator of the personal estate of C. D., deceased during the minority of E. F., executor of the last will of C. D., deceased), plaintiff, and H. S., defendant," or, "Between J. J., plaintiff, and H. S. (administrator of the personal estate of C. D., deceased during the minority of E. F., executor of the last will of C. D., deceased), defendant."
Where husband and wife sue or are sued.	Where a husband and wife are co-plaintiffs or co-defendants, the variation will run, "Between J. J. and Sarah his wife, plaintiffs, and H. S., defendant," or "Between J. J., plaintiff, and H. S. and Jane his wife, defendants."
Husband and wife executrix or administratrix.	Where a husband and wife, executrix or administratrix, sue or are sued : "Between J. J. and Sarah his wife (executrix of the last will of A. B., deceased, or administrator of the personal estate of A. B., deceased), plaintiffs, and H. S. defendant," or "Between J. J., plaintiff, and H. S. and Jane his wife (executrix of the last will of A. B., deceased, or administratrix of the personal estate of A. B., deceased), defendant."
Infants.	Where the plaintiff is an infant : "Between J. J. (an infant by A. B., his (or her) next friend), plaintiff, and H. S., defendant."
Trustees in bankruptcy, liquidation.	Where a trustee in bankruptcy is plaintiff or defendant : "Between J. J., trustee of the property of A. B., a bankrupt, plaintiff, and H. S., defendant," or, "Between J. J., plaintiff, and H. S., trustee of the property of A. B., a bankrupt, defendant" (a). Where a trustee under a liquidation claims or is defendant : "Between J. J., trustee of the property of —, whose affairs are in liquidation, plaintiff, and H. S., defendant," or, "J. J., plaintiff, and H. S., trustee of the property of —, whose affairs are in liquidation, defendant."
Partners.	Where partners sue, or are sued : "Between A. B. Brothers,
Order XVII., rr. 1, 2, 4, 5.	carried on between the continuing parties and such new party or parties may be obtained, <i>ex parte</i> , on application to the Court or a judge upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence." Rule 5 provides for notice of the order made being served upon the new parties. (a) By sect. 83 of the Bankruptcy Act of 1883, it is provided, "The trustee [of a bankrupt] may sue and be sued by the official name of the trustee of the property of —, a bankrupt, inserting the name of the bankrupt."

plaintiffs, and H. S., defendant," or, "Between A. B. Brothers, plaintiffs, and H. S. and C. B., defendants" (a).

Where a corporation is plaintiff or defendant, the full name of the corporation must be given, as "Between the Mayor, Aldermen, and Burgesses of Reading, plaintiffs, and H. S., defendant," or, "Between J. J., plaintiff, and the Mayor, Aldermen, and citizens of Carlisle, defendants."

Corporations.

The great majority of joint stock companies are regulated by the Companies Acts, 1862 and 1867, and these companies can only properly sue or be sued in their corporate name. Where the company is one with limited liability, the word *limited* forms part of its name, and must be added to it. The commencement of the pleading will in the case of these companies be: "Between the Darlington Iron Works Company, plaintiffs, and H. S., defendant," or, "Between H. S., plaintiff, and the Oceanic and Pacific Company, defendants," or, "Between the Universal Oilcake Company, Limited, plaintiffs, and T. B., defendant."

Joint Stock Companies.

There are still existing a few companies which were incorporated either by statute or by letters patent, and which, by the statute incorporating them or by their letters patent, were

Companies incorporated by statute or letters patent.

(a) The new system has made a considerable alteration here. Formerly partners had to sue in their several names, and they could only be sued individually, but now they can sue and be sued in the name of the firm under which they carry on their business as in the above example. By Order XVI. r. 14: "Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who were at the time of the accruing of the cause of action co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct." Rule 15: "Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm." By Order VII. r. 2, "When a writ is issued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the action is brought. And if the plaintiffs or their solicitor shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow, as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm."

Change in the law as to way in which partners must sue or be sued.

Names of members of firm to be declared on application of defendant.

authorised to sue or be sued in the name of a trustee, or in the name of a public officer appointed for that purpose. In such a case the pleading would run, "Between J. J. (one of the registered public officers of the — Company duly appointed to sue and be sued on behalf of the said company), and H. S., defendant."

Banking
companies.

With respect to banking companies, a distinction similar to that in the case of ordinary joint stock companies exists. Banking companies formed under the 7 Geo. 4, c. 46, s. 4, sue and are sued in the name of a public officer. But banking companies regulated by the Joint Stock Banking Companies Act, 1857, 20 & 21 Vict. c. 49, and the Act of 21 & 22 Vict. c. 91, which repealed the Joint Stock Banking Companies Act, 7 & 8 Vict. c. 113, are placed on the same footing as other joint stock companies, and sue and are sued in the ordinary form by their name of incorporation, as "Between the Kingston and Welton Banking Company, plaintiffs, and J. J., defendant," or (where the banking company is an old company regulated by the 7 Geo. 4, c. 46, s. 4), "Between T. B. (one of the registered public officers of the Kingston and Welton Banking Company), plaintiff, and H. S., defendant."

PRECEDENTS.

PRECEDENTS.

Accord and Satisfaction (a).

1. Defence of Accord and Satisfaction.

On the 5th of April, 1882 (or, the of 18 , as the case may be), a brown horse (or, insert whatever the amount or thing given was) was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

2. Defence of same plea to action for Not Delivering Goods in accordance with Charter-party.

On the 5th April, 1882, an agreement between the plaintiff and the defendant, whereby it was agreed between the plaintiff

(a) "Accord and satisfaction" means that something is given or done by the defendant to or for the plaintiff, and accepted by the latter on a mutual agreement that it shall be a discharge of a cause of action. The agreement is the accord, and the thing given or done is the satisfaction. An oral agreement will be sufficient. (*Lavery v. Turley*, 30 L. J. Ex. 49.) Accord without satisfaction or satisfaction without accord is no defence, as the two must exist. Being always ready and willing to execute the satisfaction is not a defence, as it must be performed. (*Collingbourne v. Mantell*, 5 M. & W. 289.) In the case of an ascertained debt a smaller sum is not by itself, and without any further consideration, any satisfaction of a larger amount, but if there be some additional benefit or consideration it will be binding. But in other cases the value of the thing done or given in satisfaction or accord cannot be inquired into, as they are accepted as equivalent by agreement. (See *Cumber v. Wane*, and notes thereunder, 1 Sm. L. C. 7th ed. p. 341.) In *Sibtree v. Tripp* (15 M. & W. 23) it was held that an acceptance of a negotiable instrument for a smaller sum than the debt may be a good accord and satisfaction; and in *Godard v. O'Brien*, 9 Q. B. Div. 37, it was decided that a cheque for £100, could, in law, be an accord for a debt of £125. The learned judges (Grove, J., and Huddleston, B.) expressed their dissatisfaction with the rigorous doctrine of *Cumber v. Wane*. Payment of a smaller sum may be a satisfaction of a larger ascertained debt, where there is a valid agreement to that effect, as where it is agreed to be paid before the whole debt is due, or where it is paid as a composition for the debt, under an arrangement with creditors, or where it is paid by a third party. If the satisfaction is accepted after breach, it is a good defence. (*Blake's case*, Coke's Rep. vol. 3, p. 342.)

What constitutes accord and satisfaction.

and the defendant that the defendant should deliver the cargo of the "Mary" at the Surrey Commercial Docks instead of at Hull as per charter-party of 1st March, 1882, was accepted in discharge of the alleged cause of action.

Accounts (a).

Claim by Executors of Principal against Agent for an Account.

1. The plaintiffs are executors of A., deceased.
2. From the year 1875 till his death A. employed the defendant as his confidential agent in the management of a large building estate at X.

The acceptance of a valid agreement in discharge, such as an agreement for a compromise, is a good defence unless it appear that the *execution or performance* of the agreement and not the *agreement itself* was the satisfaction intended. (*Hall v. Flockton*, 20 L. J. Q. B. 208.) An agreement to refer to arbitration is not an accord and satisfaction. (*Elliot v. R. Erch. Ass. Co.*, L. R. 2 Ex. 237.)

Accord and satisfaction made by a stranger on behalf of the defendant and accepted by the plaintiff, is a good defence. (*Jones v. Broadhurst*, 9 C. B. 173. See at 193—4.) If one of several joint creditors accept a satisfaction it is binding on the others. (*Smith v. Lovell*, 20 L. J. C. P. 37; *Wallace v. Kelsall*, 7 M. & W. 264.)

(a) By sect. 34 of the Judicature Act, 1873, the taking of partnership and other accounts is assigned to the Chancery Division. There was an old common law action of account which lay where one merchant charging another merchant as a receiver claimed an account against him, and also where there was a privity in deed or in law between the parties, as where the defendant was the bailiff or guardian of the plaintiff. The common law action went into disuse owing to the superior machinery possessed by the Court of Chancery for the taking of accounts, and for other reasons. Accounts may now be taken, under the Judicature Acts, in the Queen's Bench Division, where they are usually referred to an official referee. Although the jurisdiction is thus concurrent, actions for an account, or involving the prolonged examination of accounts, are usually brought in the Chancery Division, and it is more convenient to bring them in that division. Even before the Judicature Acts the aid of equity was invoked where the accounts were of great interest, complexity, or there were many circumstances of complication attending the case. In those days the test seems to have been whether the matter was too complicated to be tried at *nisi prius*. (*O'Connor v. Spright*, 1 Sch. & Lef. 305.) The common cases in which actions have been brought for accounts in equity are those in which there have been mutual accounts between the parties, *i.e.*, where each of the parties has received, and also paid in the moneys on the account of the other (*Phillips v. Phillips*, 9 Hare, 471), and those in which the parties stand in the position of principal and agent to one another. An agent has not the same right to an account against his principal; the principle of the action is that the plaintiffs can only learn from the discovery of the defendants how they have acted in the execution of their agency. (*MacKenzie v. Johnston*, 4 Mad. 373.) Claims for an account by *cestui que*

Assigned
to Chan-
cery Di-
vision.

3. The defendant, as such agent, received large sums of money for the said A., for which he refuses to account.

The plaintiffs claim :—

- (1.) Accounts of all sums received and paid by the defendant as such agent.
- (2.) Payment of the amount found due.

trust against trustee, and by patentee against infringer, come within the same class. In a sense a trustee is the agent of the *cestui que trust*, and a patentee may adopt the acts of an infringer, as those of an agent, and take the profits as money had and received to his use. But a patentee so claiming cannot have damages also. If he elect to have the profits, he may prove for them upon the bankruptcy of the infringer. (*Watson v. Holliday*, 20 Ch. Div. 780 : cf. *Docker v. Somes*, 2 My. & Ke. 664.)

A common defence to an action for an account is a stated and settled account, *i.e.*, that the parties have in writing gone through the account, and agreed that the balance due on one side shall be taken at so much. This is ordinarily a good defence, but in certain cases the Court will open the account, or give the plaintiff liberty to surcharge and falsify, *i.e.*, liberty to insert items wrongly omitted by the defendant, and for which the plaintiff should have credit, and to strike out items wrongly inserted by the defendant, and for which he (the defendant) should not have credit. A stronger case is required to open a stated and settled account than is required merely to obtain liberty to surcharge and falsify. Thus, where an account is impeached if a single important error is established, the Court will not, except in the case of fraud, order the whole account to be opened, but will make a decree that the plaintiff may be at liberty to surcharge and falsify. Therefore, in a partnership action where an error of £950 was established in an account long settled, it was held that in taking the accounts the plaintiff should be at liberty to surcharge and falsify, and that such liberty should not be confined to errors appearing from the books. (*Gething v. Keighley*, 9 Ch. Div. 547.) The law upon the subject has been recently considered by Jessel, M. R., in *Williamson v. Barbour*, 9 Ch. Div. 529, who thus laid down the practice of the Court :—

"The practice of the Court of Chancery, which of course is the practice of the High Court of Justice, is to consider whether the accounts shall be opened, or whether there shall be liberty to surcharge and falsify; that is, if the Court is of opinion that errors of sufficient number and sufficient magnitude are shown, it is not, as I understand it, necessary that the errors shown should amount to fraud. If they are sufficient in number and importance, whether they are errors caused by mistake, or errors caused by fraud, the Court has a right to open the accounts. I have known cases, for instance, *Clarke v. Tipping* (9 Beav. 284), which we are familiar with, in which the Court abstained purposely from using the term 'fraud,' although I am afraid no other term could be properly applied. That is not necessary. But there is this to be considered, that when the account is between persons in a fiduciary relation and the person who occupies the position of accounting party—that is the trustee or agent—is the defendant, it is easier to open the account than it is in cases where persons do not occupy that position—that is to say, that a less amount of error will justify the Court in opening the account."

And again, "Where you show a single fraudulent entry in the case of

Defence of stated and settled account.

When opened or liberty to surcharge and falsify given.

Claim by Patentee for an Account of Profits and an Injunction against an Infringer.

The defendant has infringed the plaintiff's patent, No. 14,084, for the term of 14 years, from the 21st May, 1880, for certain improvements in the manufacture of iron and steel, whereof the plaintiff was the first inventor.

Particulars of breaches are delivered herewith.

The plaintiff claims an injunction to restrain the defendant from further infringement, and an account of the profits made by him through such infringement, and payment thereof.

Claim by Principals against Agents for an Account, notwithstanding a Stated and Settled Account.

1. From the year 1853 until the 25th of December, 1883, the plaintiffs employed the defendants for reward to act as the plaintiffs' agents in buying and selling cotton goods, and in exporting and shipping and insuring the same, and the defendants so acted.

2. The accounts between the plaintiffs and the defendants were stated and settled in the ordinary way of business once in every year.

3. The plaintiffs have only just discovered, and the fact is, that the said accounts contain many false items and omissions which the defendants fraudulently made in them. In particular, the defendants during the whole period of their agency

persons occupying the position of principal and agent, or trustee and *cestui que trust*, the Court has actually opened an account extending over a greater number of years and closed for a much longer period than the account I have before me. I mean in the case of *Alfrey v. Alfrey*, before Lord Cottenham, 1 Mac. & G. 87. We, therefore, have this as a sort of guide without laying down any general rule, because every case must depend on its own circumstances, that where the accounts have been shown to be erroneous to a considerable extent, both in amount and in the number of items, or where fiduciary relations exist and a less considerable number of errors are shown, or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown there, the Court opens the account, and does not merely surcharge and falsify." But the plaintiff's claim may be barred by his laches or by acquiescence. In cases between *cestui que trust* and trustee, however, the Court is slow to admit this plea. (*Matthews v. Wilson*, 4 Ves. 125.) So where the parties are client and solicitor. (*Watson v. Rodwell*, 11 Ch. Div. 150; 48 L. J. Ch. 209; 39 L. T. 614; 27 W. R. 265.)

Claim
barred
by laches
or acqui-
escence.

made false charges in their invoices, debiting the plaintiffs with large sums which the defendants never paid, or which they had received back from other persons to whom they purported to have paid them under the name of discounts, and they have also made other charges which in their position as agents for the plaintiffs upon the terms agreed upon they were not entitled to make, particularly for profits which they have made in the purchase on behalf of the plaintiffs of grey and white shirtings, on bleaching the white goods, and in packing the goods which they shipped for the plaintiffs; and although the plaintiffs generally sent their bills to the defendants to be discounted, the defendants often discounted such bills for themselves and used the money, and when bills were entered by the defendants in the accounts as having been discounted on a certain day, they were often discounted on a later day and at a lower rate.

4. The plaintiffs from time to time instructed the defendants to insure the goods in the best offices, yet often the defendants did not do so, but have sent the goods at their own risk, at the same time charging the plaintiffs with insurance premiums higher than would have been charged in the best offices.

Particulars of many of the items improperly inserted, and of many of the items improperly omitted from the said accounts, were delivered to the defendants before the commencement of this action.

The plaintiffs claim :—

- (1.) That an account may be taken of all sums received and paid by the defendants as agents of the plaintiffs, and of the said profits and overcharges, and of all transactions between the plaintiffs and the defendants.
- (2.) Payment of the amount found due.

Defence.

The defendants say that :

1. They deny that they were ever employed by the plaintiffs to act as the plaintiffs' agents in selling cotton goods or in exporting or shipping or insuring the same, or that they ever so acted.

2. The stated and settled accounts are correct; they do not contain any item improperly inserted, nor do they want any item which ought to be inserted. If they do, none of such items or omissions were fraudulently made by the defendants.

3. In their transactions with the plaintiffs, except in regard to buying cotton goods, the defendants acted as principals and not as agents.

4. It is the custom of the cotton trade, which the defendants have followed, to retain discounts paid to them in buying goods for foreign principals, which the plaintiffs were, and the plaintiffs have always been aware of that custom, and have acted upon it and acquiesced in the defendants acting upon it.

5. Before each yearly account was stated and settled the plaintiffs had notice of all the matters complained of in the statement of claim.

6. The defendants insured the goods which the plaintiffs ordered to be insured, and became liable for the value thereof if lost by the perils insured against, as the plaintiffs were well aware, and became entitled to the customary premiums for such insurance, which are no more than the defendants have charged.

Reply.

The plaintiffs join issue upon the defence.

Claim by a cestui que trust against a Trustee claiming an Account and Payment.

1. Between the 1st of January, 1880, and the 30th of April, 1883, A. B. transferred many valuable securities, and paid large sums to C. D. in trust to transfer and pay the same to the plaintiff.

2. On the 1st of May, 1883, the said C. D. died.

3. The defendant is the executor of and has proved the will of C. D.

The plaintiff claims:—

- (1.) Accounts of all securities transferred to C. D. and moneys paid to him in trust for the plaintiff.
- (2.) The transfer of such securities and the payment of such moneys.

[For accounts in partnership actions see the title "Partnership."]

Account Stated (a).*Claim upon an Account Stated.*

1. From February to April, 1877, the plaintiff supplied the defendant with various quantities of groceries, and the defendant supplied the plaintiff with several tons of coal.

2. On the 28th of April, 1877, accounts were stated in writing between the plaintiff and the defendant, and upon such stating of accounts a balance of £32 was found to be owing to the plaintiff. Particulars of the said stated account, exceeding three folios in length, accompany this pleading.

The plaintiff claims £32.

Defence alleging that Account was stated under a Mistake.

1. The defendant denies that on the 28th of April, 1877, or at all, he stated an account with the plaintiff, showing a balance of £32, or any balance owing by him.

2. If an account was stated, the balance of £32 was arrived at by an accidental miscalculation of the figures upon the part

(a) The action on an account stated applies to the case where there have been various dealings between the parties, and finally a balance is struck, and so much found to be due from the one to the other. When this balance is agreed on, an account is said to be stated, and upon it an action can be founded. The account must have been stated to the creditor himself or his agent, and it is not sufficient if made to a stranger (*Tucker v. Barrow*, 7 B. & C. 623): but it is not necessary that the statement should be in writing: it may be by word of mouth. (*Singleton v. Barrett*, 2 C. & J. 368.) An account stated is not conclusive in the sense that the parties may never go into the items which make it up. (*Thomas v. Hawkes*, 8 M. & W. 140.) On the contrary it has been held that it may be shown that an item therein is not a good debt for want of consideration (*French v. French*, 2 M. & G. 644); or generally the defendant may show that the account was stated under a mistake, or that certain items were miscalculated or founded on error, provided the correction is promptly made before the other party has innocently acted upon the faith of the correctness of the account, and altered his previous position, so as to render it inequitable to call upon him to refund the money. (See Addison on Contracts, 7th edit., pp. 1072-3.)

What an account stated is.

Need not be in writing.

Not conclusive as to the items that make it up.

But it is no objection to an item that has been allowed in an account stated that it arose upon a contract, which was bad for want of writing within the Statute of Frauds. (*Cocking v. Ward*, 1 C. B. 858.) An infant cannot state an account. (*Trueman v. Hurst*, 1 T. R. 40.)

"In every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars; but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same shall not be alleged in the pleading." (Order XX. r. 8.)

of the plaintiff and the defendant. Upon a correct addition of the said accounts the defendant is not indebted to the plaintiff in any sum.

Administration of the Estates of Deceased Persons (a).

Claim by a Creditor for Administration of Real and Personal Estate.

The plaintiff is a creditor of X. Y., deceased, of whom the defendant C. D. is executor (or administrator), and the defendant E. F. is heir-at-law (or devisee).

Particulars of the claim :

Principal due on the bond of the testator	£	s.	d.
(or intestate), dated the 17th of May,			
1881	2,000	0	0
Interest from the 17th of May, 1882, at			
5 per cent	250	0	0
Amount due	£2,250	0	0

The plaintiff claims to be paid the amount due to him, or to have the real and personal estate of the said X. Y. administered.

Adminis-
tration
action.

(a) The administration of the estates of deceased persons is specially assigned to the Chancery Division by the Judicature Acts. In former times the ecclesiastical courts had jurisdiction over the administration of the personal estates of deceased persons, and the courts of common law had jurisdiction over the administration of the real estates of deceased persons, but the jurisdiction of the Chancery Division is now exclusive.

Administration actions are usually brought by a creditor of the deceased suing on behalf of all the creditors, for which purpose their consent is unnecessary, or by a creditor claiming payment of his debt or administration of the estate, or by a legatee or one of the next-of-kin, or a devisee, or the heir. The executor or administrator is usually made defendant. If the deceased died intestate as to his real estate, and it is desired to affect the real estate in the action, the heir-at-law should be made a co-defendant. Further provisions as to parties are made by R.S.C. 1883, Order XVI. as follows :—

Rules of
practice as
to parties.

In any case in which the right of an heir-at-law, or the next of kin, or a class shall depend upon the construction which the Court or a judge may put upon an instrument, and it shall not be known or shall be

Rules of
practice.

difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court or judge shall consider that in order to save expense, or for some other reason, it will be convenient to have the questions of construction determined before such heir-at-law, next of kin, or class shall have been ascertained by means of inquiry or otherwise, the Court or judge may appoint some one or more persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court or judge in the presence of such persons shall be binding upon the heir-at-law, next of kin, or class so represented.

Any residuary legatee or next of kin entitled to a judgment or order for the administration of the personal estate of a deceased person, may have the same without serving the remaining residuary legatees or next of kin.

Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, and who may be entitled to a judgment or order for the administration of the estate of a deceased person, may have the same without serving any other legatee or person interested in the proceeds of the estate.

Any residuary devisee or heir entitled to the like judgment or order, may have the same without serving any co-residuary, devisee, or co-heir.

Any one of the several *cestuis que trust* under any deed or instrument, entitled to a judgment or order for the execution of the trusts of the deed or instrument, may have the same without serving any other *cestui que trust*.

In all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest.

Any executor, administrator, or trustee entitled thereto may have a judgment or order against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or the execution of the trusts.

The Court or a judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Wherever, in any action for the administration of the estate of a deceased person, or the execution of the trusts of any deed or instrument, or for the partition or sale of any hereditaments, a judgment or an order has been pronounced or made:—

(a) Under Order XV.

(b) Under Order XXXIII.

(c) Affecting the rights or interests of persons not parties to the action.

the Court or a judge may direct that any persons interested in the estate, or under the trust, or in the hereditaments, shall be served with notice of the judgment or order, and after such notice such persons shall be bound by the proceedings in the same manner as if they had originally been made parties, and shall be at liberty to attend the proceedings under the judgment or order. Any person so served may, within one month after such service, apply to the Court or judge to discharge, vary, or add to the judgment or order.

It shall not be necessary for any person served with notice of any judgment or order, to obtain an order for liberty to attend the proceedings under such judgment or order, but such person shall be at liberty to attend the proceedings upon entering an appearance in the central office in the same manner, and subject to the same provisions as a defendant entering an appearance.

A memorandum of the service upon any person of notice of the

**Rules of
practice as
to parties.**

judgment or order in any action under rule 40, shall be entered in the central office upon due proof, by affidavit, of such service.

Notice of a judgment or order, served pursuant to rule 40, shall be entitled in the action, and there shall be endorsed thereon a memorandum in the Form of No. 28 in Appendix G.

Notice of a judgment or order on an infant, or person of unsound mind, not so found by inquisition, shall be served in the same manner as a writ of summons in an action.

In any cause or matter to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party, but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

If in any cause, matter, or other proceeding it shall appear to the Court or a judge that any deceased person, who was interested in the matter in question, has no legal personal representative, the Court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding, on such notice to such persons (if any) as the Court or judge shall think fit, either specially or generally by public advertisement; and the order so made and any order consequent thereon shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding.

In any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator shall, unless by leave of the Court or a judge, be entitled to appeal either in Court or in Chambers on the claim of any person not a party to the cause or matter against the estate of the deceased person in respect of any debt or liability. The Court or a judge may direct or give liberty to any other party to the cause or matter to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as they or he shall think fit.

It is an inflexible rule that the legal personal representative of the deceased is a necessary party to an action for the general administration of his estate. If the personal representative does not exist he must be constituted. But he need not be made a party where the estate has been administered by the Court, or where the legal personal representative has fully administered the estate out of court, and paid away the surplus to the persons beneficially entitled. (*Hunter v. Young*, 4 Ex. Div. 256). The creditor could follow the assets (*ibid*). The legal personal representative is also protected where he has issued and duly acted upon the statutory advertisements for creditors. 22 & 23 Vict. c. 35, s. 29.

**Legal and
equitable
assets.**

When the Chancery Division administers the estate of a deceased person, it draws a marked distinction between legal and equitable assets. Legal assets are not those in which the interest of the executor is legal, for an equity of redemption is legal assets. The test is, could the executor as such recover the asset in question, being entitled to it by virtue of his office. If so, if the executor would be liable in a common law action by a creditor to account for the assets, it was a legal asset. If not, it was equitable. (*Attorney-General v. Bunning*, 8 H. L. C. 259.) Where a creditor could only make the asset available for the payment of debts by coming into Chancery and getting a decree there, the asset was always held to be equitable. (*Thompson v. Bennett*, 6 Ch. Div. 739.) The distinction is important, for the Court of Chancery early laid hold of equitable assets to enforce an equal distribution of all the assets amongst the creditors in proportion to the amount of their debts.

In the common case of an administration suit being brought by one

creditor on behalf of all the creditors, the judgment directs accounts to be taken of the debts, funeral and testamentary expenses, and of the portions of the estate which have come to the executor's hands, and of the portions outstanding and undisposed of, and directs the assets to be applied in payment of the liabilities in the order thereafter mentioned, and orders the further consideration of the cause to be adjourned. The judgment is obeyed or worked out in chambers, and the chief clerk certifies, and after he has made his certificate the cause is usually ripe for hearing on further consideration, the nature of which will vary with the circumstances of the case. After the decree has been made the legal personal representative should not exercise any of his powers without the permission of the Court.

When the statement of claim against an executor in an administration suit alleges that he has committed wilful default, but the judgment at the trial gives no relief on that footing (the claim to such relief not being, however, dismissed), the Court can, at any subsequent stage of the proceedings, if evidence of wilful default is adduced, direct further accounts and inquiries to be taken and made on that footing. (*In re Symons, Luke v. Tonkin*, 21 Ch. Div. 757.) But in order to obtain relief on the footing of wilful default, it must be charged in the pleadings, and the plaintiff ought to be prepared to prove one or more cases of wilful default at the hearing. If these conditions are not complied with, owing to the plaintiff's ignorance of the wilful default, he might obtain leave from the Court to sue as for wilful default in a second action. (*Lancing v. Gee*, 10 Ch. Div. 715.) Defendants might (after an ordinary administration decree) bring a second action upon the wilful default without the leave of the Court.

Wilful default.

The order in which the debts are paid is as follows: (1) funeral and testamentary expenses; (2) debts due to the Crown; (3) certain statutory debts, as poor rates; (4) debts due on judgments obtained against the deceased and registered; (5) debts due on statutes and recognizances; (6) specialty debts, but now see 32 & 33 Vict. c. 46; (7) unregistered judgments against the deceased, and simple contract debts, *pari passu*; (8) voluntary bonds and covenants held by volunteers.

Payment of debts.

The debts admitted are those which become due before the signing of the certificate of the chief clerk.

To acquire any priority a judgment against the deceased must be registered, otherwise it will have no priority over simple contract debts. (*Van Ghelme v. Newark*, 21 Ch. Div. 189.)

A judgment obtained against the legal personal representative as such only gives the creditor (if more than one, in order of date of their judgments) priority over other debts of the same degree. (*Williams v. Williams*, L. R. 15 Eq. 270; *Hanson v. Stubbs*, 8 Ch. Div. 154.) The same rule applies, although the deceased died insolvent. (*Re Maggi*, 20 Ch. Div. 545.)

Whether a holder (not for value) of a bill or note for which no consideration has been given is entitled to payment in an administration suit, like a creditor whose debt arises as a voluntary bond or covenant, is not quite settled. (*Cox v. Burnard*, 8 Hare, 310; *Dawson v. Kearton*, 3 Sm. & Giff. 191.)

An executor's right of retainer for his own debt, which does not extend to equitable assets, is not determined by an administration decree, but it is voided by the appointment of a receiver. See *Richmond v. White*, 12 Ch. Div. 361, which decides that the right is not lost by the fact of the moneys being paid into Court by a third person after administration decree. The right does not extend to real estate. (*Walters v. Walters*, 18 Ch. Div. 183.)

Executor's right of retainer.

If the personal estate should prove insufficient for the payment of the debts, or the real estate is devised as the primary fund for their pay-

ment (which is a rare occurrence), and in various other cases, it may become necessary to have recourse to the real estate of the deceased, which the Court will administer for the purpose.

It is not necessary here to trace the successive stages by which land became assets for the payment of debts. But it should be noted that if the heir or devisee before action should convey the land for value, the land would cease to be liable in the hands of the purchaser. The vendor, in such case, would be personally liable. (*Spackman v. Turnbull*, 8 Surr. 253.) Whether the result would be similar if the heir or devisee merely made an equitable mortgage of the land, was, for a time, not settled, but now it is pretty clear that it would. (*British Mutual Investment Company v. Smart*, L. R. 10 Ch. 567.)

Order of
adminis-
tration.

In the absence of directions by the deceased to vary the order, the order in which the property of the deceased is applied towards the payment of his debts is as follows: (1.) The general personal estate not specifically bequeathed; (2.) Real estate devised for the payment of debts; (3.) Real estate descended to the heir; (4.) Real or personal estate devised or specifically bequeathed, and charged with the payment of debts; (5.) General pecuniary legacies; (6.) Real estate devised, and specific legacies not charged with debts; (7.) Property over which the testator had a general power of appointment, which he has actually exercised.

Whenever one of these classes is called upon to contribute towards the payment of the debts, the contribution is *pro rata*.

Whether a defaulting trustee or executor who becomes bankrupt will be allowed any of his costs of the action is very doubtful. The balance of authority is against the allowance. (*Lewis v. Trash*, 21 Ch. Div. 862; *Hannay v. Basham*, 23 Ch. Div. 195; *contra, Clare v. Clare*, 21 Ch. Div. 865.)

New rules
as to pro-
cedure.

The process of administering estates in Chancery has lately been much abused. In many cases the whole estate has been administered by the Court, although nothing of the kind was necessary or desirable, and nothing of the kind was required by the parties, who, perhaps, only differed upon mere incidental questions arising in the winding-up of the estate of the deceased. The judges have, of late, set their faces against this practice, and have even disallowed the costs of unnecessary actions. (*Croghan v. Allen*, 22 Ch. Div. 101.) The new Rules of Court (1883) tend in the same direction, for it is provided by Order LV., II., 3—12, as follows:—

The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought, as creditor, devisee, legatee, next of kin, or heir-at-law, or customary heir of a deceased person, or as *cestui que trust* under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:—

- (a.) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, heir-at-law, or *cestui que trust*;
- (b.) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others;
- (c.) The furnishing of any particular accounts by the executors, or administrators, or trustees, and the vouching (when necessary) of such accounts;

- (d.) The payment into Court of any money in the hands of the executors, or administrators, or trustees ;
- (e.) Directing the executors, or administrators, or trustees, to do, or abstain from doing, any particular act in their character as such executors, or administrators, or trustees ;
- (f.) The approval of any sale, purchase, compromise, or other transaction ;
- (g.) The determination of any question arising in the administration of the estate or trust.

New rules
as to pro-
cedure.

Any of the persons named in the last preceding Rule may in like manner apply for and obtain an order for :—

- (a.) The administration of the personal estate of the deceased ;
- (b.) The administration of the real estate of the deceased ;
- (c.) The administration of the trust.

The persons to be served with the summons under the last two preceding Rules in the first instance shall be the following, that is to say :—

(A.) Where the summons is taken out by an executor or administrator or trustee :—

- (a.) For the determination of any question under sub-sections (a), (e), (f) or (g) of Rule 3, the person or one of the persons whose rights or interests are sought to be affected ;
- (b.) For the determination of any question under sub-section (b) of Rule 3, any member or alleged member of the class ;
- (c.) For the determination of any question, under sub-section (c) of Rule 3, any person interested in taking such accounts ;
- (d.) For the determination of any question under sub-section (d) of Rule 3, any person interested in such money ;
- (e.) For relief under sub-section (a) of Rule 4, the residuary legatees or next-of-kin, or some of them ;
- (f.) For relief under sub-section (b) of Rule 4, the residuary devisees, or heirs of some of them ;
- (g.) For relief under sub-section (c) of Rule 4, the *cestuis que trust*, or some of them ;
- (h.) If there are more than one executor or administrator or trustee, and they do not all concur in taking out the summons, those who do not concur.

(B.) Where the summons is taken out by any person other than the executors, administrators, or trustees, the said executors, administrators or trustees.

The Court or judge may direct such other persons to be served with the summons as they or he may think fit.

The application shall be supported by such evidence as the Court or a judge may require, and directions may be given as they or he may think just for the trial of any questions arising thereout.

It shall be lawful for the Court or a judge upon such summons to pronounce such judgment as the nature of the case may require.

The Court or judge may give any special directions touching the carriage or execution of the judgment or the service thereof upon persons not parties as they or he may think just.

It shall not be obligatory on the Court or a judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order.

When any summons under Rules 3 and 4 of this Order has been taken out every subsequent summons relating to the same estate or trust shall be marked with the name of the judge to whom for the time being the matter is assigned, and in case any such subsequent summons shall be

Defence of C. D.

The defendant C. D. says :

1. He does not admit the plaintiff's claim.
2. He does not admit assets.
3. Payment was made by the deceased.
4. In the alternative the claim was released by deed, dated the 1st of November, 1883.

Defence of E. F.

The defendant E. F. says :

1. The personal estate of the testator is sufficient to pay the plaintiff his debt, if established.
2. This defendant is not heir-at-law or devisee of the testator.

Claim for Administration on the Footing of Wilful Default.

1. The plaintiff is residuary legatee of A. B., of the city of Bath, who died March 3rd, 1882, having made his will, dated March 2nd, 1882, and appointed the defendants his executors, who proved his will April 6th, 1882.

2. The defendants have been guilty of wilful default in not getting in certain property of the testator.

3. The wilful default on which the plaintiff relies is as follows:—

C. D. owed to the testator £1,000, in respect of which no interest had been paid or acknowledgment given for five years before the testator's death. The defendants were aware of this fact, but never applied to C. D. for payment until more than a year after testator's death, whereby the said sum was lost.

marked with the name of another judge it shall be the duty of the executors, administrators, or trustees to apply for the transfer to such first-mentioned judge of such subsequent summons.

The issue of a summons under Rule 3 of the Order shall not interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought.

The plaintiff claims :

- (1) Account of testator's personal estate on the footing of wilful default.
- (2) Administration of the testator's personal estate.

Action by Next of Kin claiming Administration of the Personal Estate of the Deceased.

1. A. B. made his will, dated the 1st of January, 1880, whereby he appointed C. D. his sole executor, and bequeathed the residue of his personal estate to the children of his brother E. B.

2. A. B. died on the 2nd of January, 1880, and C. D. proved his will on the 30th of January, 1880.

3. E. B. died in Ontario, Canada, on the 7th of December, 1879, and all his children predeceased him. None of the said children left any issue.

4. C. D. died on the 1st of January, 1883, having by his will, dated the 1st of January, 1882, appointed the defendant his executor, who proved his will on the 1st of February, 1883.

5. The plaintiffs are the lawful nieces and next of kin of A. B., who left no brother or sister him surviving.

The plaintiffs claim to have the personal estate of A. B. administered.

Action of Mortgagee for Administration of the Estate of a Deceased Mortgagor.

1. By deed, dated 1st of June, 1880, A. B. mortgaged the Hope Farm, in the county of Cornwall, to the plaintiff to secure £1000, and interest.

2. £1,200 is now due to the plaintiff on that security ; but the Hope Farm is insufficient to discharge the plaintiff's claim.

3. A. B. died on the 20th of May, 1881. The defendant X. is his executor, and the defendant Y. is his heir-at-law.

The plaintiff claims to be paid the amount due to him, or to have the real and personal estate of the said A. B. administered.

Defence of X.

The defendant X. says that :

1. He does not admit the plaintiff's claim.
2. Notice was given and assets distributed under the statute 22 & 23 Vict. c. 35, s. 29.

Particulars of the Notice.

Advertisements in the *Times* of June 1 and 17, 1881.

" " *Standard* of June 1 and 18, 1881.

" " *Cornishman* on June 1 and 8, 1881.

*Action by Assignee of Legatee to have the Testator's Estate
Administered by the Court.*

Statement of Claim.

1. A. B., of Newcastle-on-Tyne, who died on the 1st of November, 1883, by his will, dated the 31st of October, 1883, after making certain pecuniary legacies, bequeathed one-fifth share of the residue of his personal estate to X. Y., and appointed the defendants his executors.

2. The defendants proved the will of the said A. B. on the 1st of December, 1883.

3. On the 2nd of December, 1883, the said X. Y. by deed absolutely assigned his said one-fifth share in the residue of the said personal estate, and all other his interest in the said estate to the plaintiff.

The plaintiff claims administration of the testator's personal estate.

Defence.

1. The defendants are not the executors, nor is either of them the executor of A. B., deceased.

2. The defendants do not admit that X. Y. by deed or otherwise ever assigned any share or interest of him the said X. Y. in the estate or the personal estate of the said A. B. to the plaintiff.

3. If the said X. Y. ever assigned any share or interest in the estate or personal estate of the said A. B. to the plaintiff, the said X. Y. never was entitled by the last will of the said A. B. or otherwise to any interest in the estate or personal estate of the said A. B. The person named X. Y. in the will referred to in the statement of claim is not the same person as the person of that name who executed the deed in the statement of claim mentioned.

4. The will mentioned in the statement of claim was revoked by a later will dated the 1st of November, 1883, and by an order of the Probate Division of this Court dated the 15th of December, 1883, probate of the earlier will dated the 31st of October, 1883, was revoked.

Action by Legatee and Devisee against the Executor of an Executor on the Footing of Wilful Default.

1. The plaintiff is the residuary legatee and devisee of John Jones, of No. 200, Cheapside, in the City of London, who died on the 10th of December, 1881, having made his will, dated the 9th of December, 1881, and appointed A. B. and C. D. his executors, and devised to them all the residue of his real and personal estate in trust for the plaintiff, and bequeathed a legacy of £100 to the plaintiff.

2. C. D. was dead at the date of the will; A. B. alone proved it.

3. A. B. was guilty of wilful default in not protecting and using to the best advantage certain property of the testator.

4. The wilful default on which the plaintiff relies was as follows :—

A. B. neglected to sue X. Y. for a debt of £100 due to the testator, and X. Y. became bankrupt in May, 1883, and no dividend has been paid on the said debt.

A. B. let the house, No. 100, Linden Gardens, in the parish of —, in the county of —, being part of the testator's property, to J. B., for twenty-one years, at the annual rent of £50, although the fair annual rent of the said house, as A. B. well knew, was £150.

At the time of the testator's death John Smith had been in possession of the testator's house, No. 101, Linden Gardens,

allowed for eleven years, as the said A. B. knew. Yet A. B. allowed John Smith to remain in possession for more than a year after the testator's death, and failed to sue for the recovery of possession thereof, whereby John Smith acquired a prescriptive title to the house.

5. In June, 1863, A. B. died, having by his will, dated the 2nd of March, 1853, appointed the defendant his executor. The defendant proved his will on the 1st of July, 1863.

The plaintiff claims:—

- (1. Account of the estate of John Jones on footing of wilful default.
- (2. Administration of the testator's real and personal estate.
- (3. If the defendant should not admit assets, administration, so far as may be necessary, of the real and personal estate of A. B.

Defence.

The defendant says that :

1. He denies that A. B. was guilty of wilful default.
2. Nothing could have been recovered from X. Y. by suing him. The house, No. 100, Linden Gardens, was not worth more than £50 a-year, and no higher rent could be obtained for it. John Smith acquired an absolute and indefeasible title by prescription before the death of John Jones.
3. The defendant does not admit that he has assets of A. B. sufficient to satisfy the plaintiff's claims (if established) in a due course of administration.

Administrator.

See the title Executor.

Agents (a).***Action against Agent for Selling on Credit against Instructions, and at Lower Price than directed.***

1. The plaintiff has suffered damage by the defendant, as his agent, selling large quantities of coal upon credit when he was

(a) Where no fixed time of service has been agreed upon, a principal may at any time revoke the authority of his agent, unless indeed the agent has, as it is called, an authority coupled with an interest, as where a debtor hands to his creditor a power of attorney, authorizing him to sell certain lands of the debtor, and pay his debt out of the proceeds of the sale. Here it was held that the agent's authority could not be revoked. (*Gausson v. Morton*, 10 B. & C. 731.)

Principal and agent.

The agent must keep regular accounts and vouchers, and if he refuses to account after demand made, he is liable to an action (*Topham v. Braddick*, 1 Taunt. 571); and if goods have been intrusted to an agent to sell, and he renders no account of them, it will be presumed that they have been sold and the money received. (*Hunter v. Welsh*, 1 Stark. 224.) Agents must bring to the discharge of their duty towards their principals a reasonable and ordinary amount of skill and judgment. So that if a broker or commission agent is ordered to buy an article of first-rate quality and he buys an inferior one, he is guilty of such a breach of contract as renders him liable in damages to his principal. (*Mainwaring v. Brandon*, 2 Moore. 125.) Subject to this responsibility the powers of brokers and mercantile agents of that class are very considerable. They have, generally speaking, an implied authority to sell at such times, places, and prices as they think most to the advantage of their principal, and even to sell on credit, if on the particular market it is customary for agents to do so, but in order that they may bring an independent judgment to bear on each matter in which they act, no agent is allowed either to sell his own goods to his principal (*Bentley v. Craven*, 18 Beav. 75), nor can he himself become the purchaser of his principal's property unless in a very extreme case. (*Trevelyan v. Charter*, 9 Beav. 140.)

An ordinary agent is not liable to his principal merely, because the person to whom he sold the goods became insolvent without paying for them, that is to say, where the agent has acted with ordinary discretion in giving him credit, and within his general authority; but it is otherwise with *del credere* agents. Every person accepting the commission of a *del credere* agent in consideration of a higher commission, makes himself responsible for the solvency of the persons to whom he sells, and in fact he becomes absolutely liable to the principal for the payment of the price of the goods he sells. (*Mackenzie v. Scott*, 6 Bro. P. C. 291.) It must be noticed that although a *del credere* agent is thus in one sense a person liable for "the debt, default, or miscarriage" of another, yet it has been decided that the agreement between himself and his principal is an independent contract, by which the goods are sold to him, and therefore it is not necessary that it should be evidenced by writing, under the Statute of Frauds. (*Couturier v. Hastie*, 8 Exch. 40.)

Del credere agents.

It is a well-established rule that an agent shall not, after accounting with his principal and receiving money in his capacity of agent, afterwards say that he did not do so, and did not receive it for the benefit of his principal but for some other person, unless indeed there has been some mistake, and a void payment *ab initio*, so that the money was never really received for the principal. (*Edgell v. Day*, 35 L. J. C. P. 7; L. R.

Effect of accounting to principal.

...and the defendant says that the defendant was the first person to see the plaintiff and that the plaintiff was the first person to see the defendant.

The defendant says that the defendant was the first person to see the plaintiff and that the plaintiff was the first person to see the defendant.

Defendant's Evidence —

...and the defendant says that the defendant was the first person to see the plaintiff and that the plaintiff was the first person to see the defendant.

The plaintiff claims that...

Witnesses and Exhibits —

Witnesses.

The defendant says:

1. The plaintiff employed him to sell all real property to

There is
evidence
that the
plaintiff
was the
first person
to see the
defendant.

...and the defendant says that the defendant was the first person to see the plaintiff and that the plaintiff was the first person to see the defendant.

...and the defendant says that the defendant was the first person to see the plaintiff and that the plaintiff was the first person to see the defendant.

As to specific instructions, see page 125.

him at the best prices he could obtain and according to market rates, and the defendant authorised him to give credit in the exercise of his discretion.

2. He sold the 1000 tons of coal in the ordinary way of business to persons who were of good commercial reputation.

3. The plaintiff did not direct the defendant to sell the 2000 tons of coal mentioned in the statement of claim for 16s. a ton. He sold them for the best price he could obtain.

4. He was never the *del credere* agent of the plaintiff.

Counter-claim.

And by way of counter-claim,—

5. The defendant claims the sum of £100, being his agreed commission of 6d. per ton on 4000 tons of coal sold by him on the plaintiff's behalf in the town of C. during the year 1879. Particulars of the said sales of coal, being of greater length than three folios, accompany this defence and counter-claim.

Reply.

The plaintiff, as to the defence, says he joins issue.

The plaintiff, as to the counter-claim, says:

1. It was expressly agreed that the defendant should only be entitled to the said commission of 6d. per ton when he remitted to the plaintiff the price of the coal sold by him.

2. He has not remitted the price of the 4000 tons of coal sold by him in the year 1879 or any part thereof.

Action against an Agent for not Paying Over the Price of Goods sold by him, and for Damages for Negligently Selling.

1. On the — of —, 188—, the defendants, as the plaintiff's agents, sold 100 tons of the plaintiff's manure, and received the price thereof, viz., £250, but they refuse to pay over the said sum, less their commission.

2. In the alternative, the defendants sold the said 100 tons of manure to G. H. at three months' credit, and delivered the same to him.

3. The said G. H. was then in insolvent circumstances, and the defendants might by ordinary care and diligence have

ascertained the fact. G. H. has become bankrupt, and the plaintiff has been unable to recover any portion of the said £250.

The plaintiff claims £250 as damages.

Defence.

1. The defendants have not received the price of the said 100 tons of manure or any part thereof.
2. The defendants sold the said manure to the said G. H. by the express directions of the plaintiff.
3. The said G. H. was not then in insolvent circumstances, and if he was, the defendants could not by the exercise of ordinary care and diligence have ascertained the fact.
4. The plaintiff might have received the greater portion of the said sum of £250 from the estate of the said G. H. if he had not neglected and failed to prove against it.

Reply.

The plaintiff, as to the defence, says he joins issue.

Agistment (a).

Claim for Loss of Cattle through Negligence and Misconduct of Agister.

1. The plaintiff's claim is for damages for the loss of seven head of cattle received by the defendant on the 1st of May, 1880, to be agisted in his park for reward.

Duty and liability of an agister.

(a) The duty of an agister of cattle is to furnish them with suitable food and nourishment, and to give them a proper and reasonable amount of exercise and fresh air. He is also bound to take reasonable care of their safety. Thus, if he turn them on a common and afterwards take no heed of them so that they are lost, he is liable. (*Oggs v. Bernard*, 2 Raym. 909.) If a person places a horse in a pasture surrounded by rotten or defective fences, and the horse is lost, the agister is liable, but if it went away through its own vicious or ungovernable nature, and got away through its own impatience of restraint as much as in consequence of the defects of the fences, the agister is not liable. (Addison on Contr., 7th ed. 653. See also *Smith v. Cook*, L. R. 1 Q. B. D. 79.)

In the case of gratuitous bailment or agistment the agister is only liable for gross neglect. (*Routh v. Wilson*, 1 B. & Ald. 61, 62.)

2. Through the negligence of the defendant the said cattle were mixed with other cattle which were at the time suffering from a contagious disease, whereby they contracted the said disease, and by the further negligence of the defendant the said cattle did not receive proper medicine and attendance while they were ill.

The plaintiff claims £60 damages.

Defence and Counter-claim.

Defence.

1. The said cattle were never mixed with any other cattle suffering from any contagious disease, and they did not contract the said disease in that way.

2. The plaintiff's cattle were properly attended by the defendant while they were ill, and suitable medicines were given to them.

Counter-claim.

And by way of counter-claim,—

3. There is due and owing to the defendant the sum of £10 for twenty weeks' agistment of the said seven head of cattle at — per week, and £2 for medicine supplied to the said cattle while ill.

The defendant counter-claims £12.

Reply.

1. The plaintiff as to the defence says he joins issue.

2. As to the counter-claim he says that up to the time of the death of the said cattle there was due in respect of their agistment the sum of £8, and no more. The defendant did not supply any medicine to the said cattle.

Alteration (a).

Defence of Alteration in Action upon a Bill or Note.

1. The bill (*or note, or check*) was rendered void after issue by a material alteration, viz., by the alteration of the date from the 21st of January to the 2nd of January.

(a) "When any deed is altered on a point material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by

Apprentice (a).

Action against the Bondsman for Misconduct of Apprentice.

1. By an indenture of apprenticeship, dated 10th August, 1875, made between defendant and C. H. L., of the one part, Misconduct of an apprentice.

(a) A contract of apprenticeship can only arise where there is an undertaking on one side to serve and learn, and on the other to teach. Therefore if there is an engagement on the part of the servant to serve and learn, but no express or implied engagement on the part of the master to teach, so that no action could be maintained upon the contract against the latter for neglecting to teach, the contract is one of hiring and service only, and not of apprenticeship. (*R. v. Shingfield*, 14 East, 541; *R. v. Hurbach*, 1 M. & S. 370.)

What constitutes the contract of apprenticeship.

As the contract is always made for more than a year, it must be in writing, but need not always be by deed; but it is essential to the validity of the contract that the consideration or premium paid be duly set forth upon the face of the instrument, in order that the proper amount of stamp duty may be secured thereon. (*Westlake v. Adams*, 27 L. J. C. P. 271.) Except in cases to which the custom of the City of London applies, an apprentice is not bound by an indenture of apprenticeship upon his attaining his twenty-first year, and he can then with perfect impunity, so far as he personally is concerned, leave his master's service though the term of service has not expired. The master is not however necessarily without any remedy, for it is usual in apprenticeship articles for some person, frequently the apprentice's father, to covenant for the apprentice's good behaviour during the term of service, and where there is such a covenant, though the apprentice may, on attaining twenty-one, leave his master's service, the bondsman would remain liable. (*Cuming v. Hill*, 3 B. & Ald. 59.)

Must be in writing.

Apprentice not bound after 21.

In the articles of apprenticeship it is usual for the master to enter into a set of covenants that he will properly instruct the apprentice, and for the apprentice and his bondsman to enter into covenants that the apprentice will faithfully serve; but it has been decided that these covenants are perfectly independent covenants, and that breach of the one cannot be pleaded as a defence to breach of another. (*Winstone v. Linn*, 1 B. & C. 460; *Phillips v. Clift*, 28 L. J. Ex. 153.) Thus, if the bondsman were sued for the misconduct of the apprentice in absenting himself, it would be no defence to the bondsman that the master had neglected properly to instruct the apprentice. The bondsman's proper course would be to add to his defence, whatever it might be, a counter-claim against the master. This is the course adopted in the forms given in the text. It is, however, a good defence to an action against the bondsman for a desertion by the apprentice of his service that the master had abandoned one of the trades which he had covenanted to teach the apprentice (*Ellen v. Topp*, 6 Exch. 424); and it is a good defence to an action for breach of the covenant to teach and provide for an apprentice that he quitted the service without leave. (*Hughes v. Humphreys*, 6 B. & C. 680.)

Covenants by master and bondsman independent covenants.

It is said that a master takes his apprentice for better or for worse, and if, therefore, the apprentice become ill so that he cannot work, or meets with an accident, so that the master is put to additional expense on his account, the master is still bound to keep him in his service and to provide for him. (*Reg. v. Smith*, 8 C. & P. 153.) It is laid down in several text books, and assumed to be law by the judges in one or two old cases, that a master is entitled to chastise his apprentice. Mr. Manley Smith,

Master bound to maintain apprentice though he becomes ill.

and the plaintiff of the other part, the said C. H. L. put himself apprentice to the plaintiff to learn his trade of a blacksmith for the term of three years; and the defendant covenanted that the said C. H. L. should diligently serve the plaintiff, and that he should not absent himself from the service of the plaintiff without the plaintiff's consent during the said term.

2. The said C. H. L. has not, during the said term, diligently served the plaintiff, but has unlawfully absented himself, and still absents himself, from the service of the plaintiff.

The plaintiff claims £50.

Defence and Counter-claim.

Defence.

Misconduct of an apprentice.

1. While the said C. H. L. was faithfully serving the plaintiff, the said plaintiff not only threatened to do him grievous bodily harm, but actually assaulted him and inflicted personal injury upon him, and the said C. H. L. fearing, and having good and

Master may moderately chastise his apprentice.

in his book on "Master and Servant," (3rd ed. 110), has suggested that the master's right of chastisement only extends to infant apprentices: and the law on the subject is not very clear. In *Hallivell v. Connell*, 38 L. T. N. S. 176, the question was raised whether a threat of inflicting grievous bodily harm uttered by the master would justify an apprentice in running away, and exonerate the bondsman on his covenant. The case went off on the pleadings, but Grove, J., expressed an opinion that the defence would be sufficient if an averment were added that the apprentice had reasonable grounds for believing that grievous bodily harm would in fact be inflicted on him if he remained.

When at the time the indenture of apprenticeship was signed the defendant's business was a partnership carried on in London but subsequently the partnership was dissolved, and two of the defendants continued the same class of business at Derby, and their partners remained in London, it was held by the Court of Appeal (1) that the apprentice was not bound to obey a command to go to Derby, because there is an implied stipulation that the contract of apprenticeship is to be performed at the place where the business was carried on when the indenture was signed; and (2) that as the business in its entirety was not carried on by the defendants who went to Derby, they were not the successors of the original firm, and therefore not entitled to the apprentice's obedience. (*Eaton v. Western*, 9 Q. B. D. 636.) But when an apprentice is part of his master's family there is authority that he is bound to follow the latter to any part of England, though not abroad. (*Coventry v. Windal*, 1 Broul. 67.) As to the powers of justices to settle disputes between masters and apprentices, and cancel indentures of apprenticeship, see 38 & 39 Vic. c. 90, ss. 5 to 7.

reasonable cause for such fear, that if he remained longer in the service of the said plaintiff grievous bodily harm would be inflicted upon him, left the said service before the expiry of the term for which he was apprenticed, which is the grievance complained of.

Counter-claim.

And by way of counter-claim the defendant says :—

1. By the indenture referred to in the statement of claim, the said plaintiff covenanted with the said defendant, that he would teach and instruct the said C. H. L. in the trade of a blacksmith during the said term.

Counter-claim for neglecting to teach the apprentice.

2. Before the happening of the events set out in the second paragraph of the plaintiff's statement of claim, the said plaintiff neglected to teach and instruct the said C. H. L. in the trade of a blacksmith aforesaid, to the loss and injury of the defendant.

The defendant claims :—

£50 damages for the plaintiff's breach of his covenant.

Arbitration.

See *Award*.

Architect (a).

Claim against an Architect for withholding his Certificate, and alternatively against the Employer.

1. In June, 1880, the defendant A. C. was the architect of the defendant J. B., in connection with the building of a mansion house for the said J. B. at Hounslow.

(a) An architect employed to determine questions between a builder and employer may be sued for neglecting to perform the functions he has undertaken to perform. (See *Kimberley v. Dick*, L. R. 13 Eq. 1; 41 L. J. Ch. 38; 25 L. T. 476; 20 W. R. 49.) It has been held that if the employer induce the architect fraudulently to withhold his certificate the employer is liable to be sued for inducing the architect to act

Liability of an architect.

2. The defendant A. C. with the view of earning his commission as such architect, induced the plaintiff to tender for the mason's work in the said building for a sum of £1000 and as the architect of the defendant J. B., and by the authority of the said J. B., he accepted the plaintiff's tender, and orally agreed with the plaintiff that, as soon as the work was done in a sound and workmanlike manner, he would certify his satisfaction, so as to enable the plaintiff to recover the price thereof from the said J. B.

3. The plaintiff duly executed the said work in a sound and workmanlike manner, but the defendant A. C., in collusion with the defendant J. B., and in fraud of the plaintiff, refused, and still refuses, to certify his satisfaction with the same, and the plaintiff has not yet been paid the said sum of £1000.

The plaintiff claims :—

£1000 from the defendant J. B. or in the alternative from the defendant A. C. the sum of £1000 by way of damages.

Assault and Battery (a).

1. *Statement of Claim for an Assault.*

1. The plaintiff has suffered damage from personal injuries to the plaintiff, caused by the defendant assaulting him on the 1st of May, 1882, and beating him about the head and shoulders.

Particulars of expenses :—

Mr. Jones, surgeon £20 0 0

The plaintiff claims £100.

in this manner. (*Batterbury v. Vyse*, 32 L. J. Ex. 177.) And so where the architect, having agreed with the plaintiff to give his certificate when the work was completed, fraudulently withheld it, in collusion with the employer, it was held the former was liable in damages. (*Ladbroke v. Barrett*, 46 L. J. C. P. 798 ; 36 L. T. 616 ; 25 W. R. 649.) He cannot, however, be held liable for mere errors of judgment in the discharge of his duty of adjudicating. (*Kimberley v. Dick*, *supra*.)

(a) An assault has been defined as "an attempt to do a corporal injury to another, coupled with a present ability, or any act or gesture from which an intention to commit a battery may be implied" (*Read v.*

2. *Statement of Claim for an Assault, Trespass, and Trover combined.*

1. On the 3rd of June, 1881, the defendant broke and entered the plaintiff's premises, No. 60, George Street, Strand, in the county of Middlesex, and unlawfully trespassed therein.

(*Walker*, L. J. 22 C. P. 201); so riding after a person and obliging him to run away to avoid being beaten is an assault; so lifting a stick and threatening to strike another with it if you are so near to that other that you can put your threat into execution if you choose. A battery, which always includes an assault, is, however, something more than an assault. It is the actual doing an injury, be it ever so small, in an angry or revengeful or rude or insolent manner, as by spitting in a man's face, or violently jostling him out of the way. (B. N. P. 15.) It is essential both to an assault and a battery that the act complained of should be done against the will of the person assaulted. Hence a touch or stroke in jest, where the parties are jesting with each other and taking liberties by mutual consent, is no assault; so touching a friend to engage his attention is no assault (*Coward v. Baddeley*, L. J. 28 Ex. 260); but it is not essential to an assault that it should be wilful. A negligent act is just as actionable as a wilful one, although no doubt in the result the measure of damages awarded by the jury would be very different. A wife, after being divorced from her husband, cannot sue him for an assault committed upon her during coverture. (*Phillips v. Barnett*, 1 Q. B. D. 436; 45 L. J. Q. B. 277; 34 L. T. 177; 24 W. R. 345.)

A negligent act may be an assault.

The defences that have been set up and sustained to actions for assault are somewhat numerous:—1. From what has been already said as to an assault excluding consent, it follows that a plea that the assault was committed by the leave and licence of the plaintiff is a good answer. (*Christopherson v. Bare*, 11 Q. B. 473, 477; *Latter v. Braddell*, 50 L. J. C. P. 166.) 2. Again, a plea that the injury was unavoidable, the result entirely of a superior agency, and the conduct of the defendant free from fault, has been sustained. (*Gibbons v. Pepper*, 1 Ld. Raym. 38.) 3. A defence that the plaintiff made the first assault, and that the defendant's battery was in self-defence, is a good answer. This defence was called *non assault d'emesne*; and it has been decided with reference to it that it is not every assault that will justify every battery, and that it is a matter of evidence whether the assault was proportionable to the battery. Thus, if A. strikes B., B. cannot justify drawing his sword and cutting off B.'s hand. 4. Another defence is that the defendant was possessed of a house, that the plaintiff without his licence entered and disturbed him, whereupon he requested the plaintiff to depart, and on refusal gently laid hands on him to turn him out. This plea refers merely to the case of one who trespasses without violence in the house of another; in the case of one making a forcible entry, the plea is different. 5. If the plaintiff enters forcibly into the defendant's house, the latter may resist force by force without any previous request to depart. 6. Where the plaintiff wrongfully holds possession of land against the will of the freeholder, who assaults him while endeavouring to regain possession, no action will lie. (*Harvey v. Bridges*, 14 M. & W. 437. See also *Blades v. Higgs*, L. J. 30 C. P. 347.) 7. Where the action is brought in respect of an assault committed upon a youth, it is a good answer that the assault complained of was moderate and reasonable chastisement inflicted by a parent or a schoolmaster, or in the case of an apprentice by the lad's master (see *ante*, p. 132). 8. Constables and those acting in the execution of warrants may justify necessary assaults committed by them in the execution of their duty. Provided the warrant under which

Justifications of an assault.

Self-defence.

Assault in defence of a man's house.

Moderate chastisement.

Constables executing warrants.

2. On the same occasion the defendant struck and assaulted the plaintiff, and seized a certain piano, belonging to the plaintiff, then in his said house, and removed it from the said premises, and converted it to his own use.

The plaintiff claims :—

- (1) A return of the said piano, or £50, its value.
- (2) £100 damages for the said trespass, and the said assault.

Defence.

1. The defendant did not break and enter the plaintiff's said premises, as alleged, or at all. On the day named he quietly and peacefully entered the same, under the express leave and licence of the plaintiff.

2. The said piano, which the defendant seized, was the property of the defendant.

Where case
has been
determined
by justices.

Statute of
Limitation.

Where
assault
amounts
to a felony.

they act is not void on its face, and does not issue from a court without jurisdiction, they are protected by such warrant, even though it be afterwards set aside for some irregularity; but when the warrant is set aside, those who put the law in motion, as the client or solicitor, would probably be liable for the acts of the constables. 9. Assault is one of those cases where the party aggrieved has an alternative remedy. He can seek redress either in the civil courts or in a criminal court; but he cannot have both remedies. Therefore it is a good answer to an action for assault that the defendant was summoned by the plaintiff before a magistrate for the same assault, and that the magistrate heard the case and either dismissed it or inflicted a penalty upon the defendant which the latter has endured, and that he "forthwith" gave a certificate of his having heard and disposed of the case. (See the 24 & 25 Vict. c. 100, s. 45.) On this statute it has been decided that a person who has been convicted of a common assault on a married woman, and who has paid the whole amount adjudged to be paid, may rely on the protection given by it as a bar to an action against him by the husband for the loss he, as such husband, has sustained by the assault on his wife. (*Masper v. Brown*, 45 L. J. Com. P. 203; 1 C. P. D. 97; 34 L. T. 254; 24 W. R. 369; *Holden v. King*, 35 L. T. 479; 25 W. R. 62; 46 L. J. Ex. L. 75.) 10. A plea of the Statute of Limitations is of course good, the one point to be noticed about this defence in connection with this form of action being that the plaintiff's remedy is barred, not after six, but after *four* years. 11. It was once thought, and so decided, that where the assault complained of turned out to be a felony for which the defendant had not been prosecuted, the defendant might avail himself of this, and the plaintiff must be nonsuited (*Wellock v. Constantine*, L. J. 32 Ex. 285; 2 H. & C. 146); but this view was declared to be erroneous in the more recent case of *Wells v. Abrahams* (L. R. 7 Q. B. 554; 26 L. T. 433; 20 W. R. 659; 41 L. J. Q. B. 306); and, since *In re Shepherd, ex parte Ball* (48 L. J. Bank. 57; 10 Ch. D. 667; 40 L. T. 141; 27 W. R. 563), and *Rooke v. D'Arigdor* (10 Q. B. D. 412), it must be taken to be quite discredited.

3. The defendant denies that he ever struck or assaulted the plaintiff.

3. Statement of Claim in Action for Assault, and Slander, and False Imprisonment.

1. On the 5th of June, 1882, the defendant assaulted the plaintiff, and, with the assistance of divers others persons, conveyed him by force to the H. Asylum, where for several days he unlawfully imprisoned him.

2. On the said 5th of June the defendant falsely and maliciously spoke and published of and concerning the plaintiff the words following, that is to say, "He (meaning the plaintiff) is a raging maniac. He has already murdered one person, and if we let him go, he will murder somebody else"—meaning thereby that the plaintiff had committed an indictable offence.

The plaintiff claims £1000 damages.

4. Statement of Claim in an Action for Assault by Pupil against Schoolmaster.

On the 5th of August, 1880, the defendant made a violent assault upon the plaintiff, and severely beat him about the face, head, and back with a thick stick.

Particulars of injury :—

The plaintiff was for six weeks confined to his bed, and has sustained permanent injuries to his spine.

Particulars of damages :—

1880. Dr. Smith's bill	.	.	.	£23	0	0
Nursing	.	.	.	10	0	0

The plaintiff claims £200 damages.

Defence.

1. The defendant is the master of the H. Grammar School. On the said 5th of August, 1880, the plaintiff was a pupil under

the defendant's charge and control, and while under such charge and control, he was guilty of gross impertinence towards the defendant, and of such insubordination as rendered it necessary for the preservation of the discipline of the school that the plaintiff should be punished.

2. Thereupon, the defendant moderately, and using no more violence than was necessary, chastised the plaintiff with a birch rod, which is the grievance complained of.

5. *Statement of Claim in an Action against a Constable and a Surgeon for Indecently Assaulting a Female Prisoner.*

On the 1st of June, 1881, the defendant A. B., acting by the orders and directions of the defendant C. D., indecently assaulted the plaintiff, and against her will made an examination of her person, with the professed object of ascertaining whether she had been recently delivered of a child.

The plaintiff claims £100 damages.

Defence of the Defendant A. B.

1. The defendant A. B. did not assault the plaintiff.
2. He did examine her person on the said date at her request.

Defence of the Defendant C. D.

1. The defendant C. D. denies that the defendant A. B. ever made any assault upon the plaintiff.

2. He says, further, that if he did, he did not do so by the orders or directions of this defendant.

Assignee.

See Chose in Action.

Attorney.

See Solicitor.

Award (a).

1. *Statement of Claim in an Action on an Award.*

1. On the 1st of May, 1880, the plaintiff and defendant, by an agreement in writing of that date, referred all matters in

(a) A party who has obtained an award in his favour can enforce his rights under it, either by (a.) an action upon the award, or (b.) when the submission has been made a rule of Court, summarily by an order obtained in chambers. We are only concerned with the former remedy.

How award
is enforced.

In drawing a claim upon an award, it is conceived that the material averments are, first, that certain differences were submitted by the plaintiff and defendant to the arbitration of an arbitrator named; secondly, that the arbitrator accepted the burden of the reference; and thirdly, that he awarded in favour of the plaintiff for whatever sum is sought to be recovered in the action. The terms of the submission ought not to be set out in the claim, nor, as a rule, should the full text of the award be given. There may, no doubt, be cases where the precise words are material. Then they should be given; but generally it will be proper merely to say that the award was for such a sum, or directed that a particular thing should be done.

Where an arbitrator has awarded that the plaintiff shall have the cost of the action, or reference, or award, or any of those costs, it is not, as a rule, a condition precedent to an action for their recovery that the exact amount of the costs should be ascertained by the arbitrator, or that the plaintiff should get them taxed. (See *Holdsworth v. Wilson*, 32 L. J. Q. B. 289; 4 B. & S. 1; *Lewis v. Rossiter*, 44 L. J. Ex. 136; 33 L. T. 260; 23 W. R. 832.) The plaintiff may bring his action for them, and obtain judgment for such a sum as the taxing officer of the Court may find to be due. But if the arbitrator expressly awards that the plaintiff shall have certain costs "to be taxed," it may be that in such a case the costs should be taxed before action brought.

Costs of
award.

"When a cause alone, or a cause and all matters in difference, are referred, and nothing is said in the submission respecting costs, the arbitrator has implied authority to adjudicate respecting the costs of the cause, but not of the reference or award, and each party must bear his own costs of the reference, and is liable to half the costs of the award." (Russell on Arbitrations, 6th ed., p. 382.) But "on a reference of a cause and all matters in difference, if there be an express clause giving the arbitrator power over costs, and there appear nothing in the context to limit the generality of the power, the costs of the reference and award, as well as of the cause, seem to be submitted to his award." (*Ibid.*) Therefore the arbitrator cannot make any award with regard to the costs of the cause, reference, or award, unless in the submission he has received from the parties, expressly or impliedly, a power to deal with the costs to the extent that he has dealt with them.

A submission to arbitration need not be in writing, nor is it necessary that any formal words should be used. An award upon a parol submission is perfectly good, and may be enforced by action; but it cannot be enforced summarily, because a parol submission cannot be made a rule of Court. The award must be made within the time specified by the submission, unless there is power given to the arbitrator to enlarge the time, and, acting under that power, he has enlarged it, or unless it has been enlarged by the express or implied consent of the parties, or unless the Court, under the large statutory power given by the 3 & 4 Will. IV. c. 42, s. 39, and the Common Law Procedure Act, 1854, s. 153, extends the time.

Submission
may be by
parol.

dispute between them in reference to the building of a mansion house for the defendant by the plaintiff to the award of A. B.,

Where the submission has been made a rule of Court, the Court has power to enlarge the time even after the award has been made. (*Lord v. Lee*, L. R. 3 Q. B. 404.) See the law and cases fully discussed in Russell on Arbitrations, 6th ed., Chap. III.

Arbitrators are generally, though not necessarily, paid. In practice an arbitrator exercises a lien upon the award, which he does not publish until one or other of the parties pays his charge. He is entitled, however, to sue for his fees, and the party who invited him to act is primarily liable to him.

How far
misconduct
of arbit-
rator a
defence.

Prior to the Judicature Acts, the misconduct, or corruption, or partiality, or mistake of an arbitrator was no defence whatever to an action upon the award. The party aggrieved might, by moving the Court within the proper time, get the award set aside on these grounds; but if he let that opportunity go by, he could not set up the misconduct as an answer to an action. (*Gracebrook v. Davis*, 5 B. & C. 534; *Whitmore v. Smith*, 7 H. & N. 509; *Thornburn v. Barnes*, L. R. 2 C. P. 384.) But as under the old system, a bill might be filed in equity for relief against an award where the arbitrator had misconducted himself, and as by section 24 of the Judicature Act, 1873, all equitable defences may now be relied upon, it has been suggested that a defence of the misconduct of an arbitrator would be good. (See Russell on Arbitrations, 6th ed., p. 550.)

The effect
of award
not being
final.

But it is a defence to an action on an award that the award is bad because it is not final, and still leaves some one or other of the matters referred to the arbitrator undecided. When several matters are referred, unless the submission provides that the arbitrator shall find specifically as to each, he may award a lump sum generally. (*Whitworth v. Halse*, L. R. 1 Ex. 251; 35 L. J. Ex. 149.) Although an award be apparently good upon its face, if in fact matters which were referred to the arbitrator have *not been decided by him*, and this is clearly established by plea or affidavit, the award is bad. (*Sallows v. Girling*, Cro. Jac. 277; Russell on Arbitrations, 6th ed., p. 273.)

An action may be brought in the Chancery Division to obtain specific performance of an award, as when the award is that the defendant give the plaintiff a lease of certain premises. (*Per Lord Cranworth in Blackett v. Bates*, 1 Ch. App. 125; 34 L. J. Ch. 515.)

Revocation
of sub-
mission.

At common law, as a rule, a submission to arbitration could be revoked at any time before the award was made. This power was limited by the 3 & 4 Will. IV. c. 42, s. 39, which provided that if an agreement to refer contained a clause that the submission might be made a rule of Court, neither party should revoke the submission without the leave of the Court. If, however, a party, in cases where he may still do so, does revoke the submission, or refuses to appoint an arbitrator, or to go on with the reference, he is liable to an action (*Scott v. Avery*, 8 Ex. 487; 5 H. L. C. 811; *Goldstone v. Osborn*, 2 C. & P. 551); or the other party may apply under sec. 11 of the Common Law Procedure Act, 1854, for an order staying the action until an arbitration has been held. (*Davson v. Fitzgerald*, 1 Ex. Div. 257 (C. A.)) But the High Court has no jurisdiction to issue an injunction to restrain a party from proceeding with an arbitration upon a matter not within the agreement to refer, although such arbitration proceeding may be futile and vexatious. (*The North London Railway Co. v. The Great Northern Railway Co.*, 11 Q. B. D. 30 (C. A.))

Unless the plaintiff sues upon the award within six years from the day of its publication, his remedy is barred by the Statute of Limitations, 3 & 4 Will. IV. c. 42, s. 3. But if the submission was by deed, he will have twenty years in which to sue.

of C., and it was further agreed that the costs of the said reference and award should be in the discretion of the said A. B.

2. The said A. B. duly heard the parties and published his award ; by which he awarded that the defendant should pay to the plaintiff the sum of £510, and the plaintiff's taxed costs of the reference.

3. The said costs have been taxed at £75.

The plaintiff claims the said sums of £510 and £75.

Defence alleging that the Award is not Final.

1. The defendant says that the said award is not final, and that the said A. B. has not determined all the matters referred to him.

2. The defendant had at the time of the submission to arbitration, and still has, a large claim against the plaintiff for penalties for not duly proceeding with the work under his contract. The defendant's said claim was referred to the said A. B., but he has wholly omitted to consider or make any award with reference to it.

2. Action for Specific Performance of an Award.

1. By an agreement in writing between the plaintiff and the defendant, made on the 1st of July, 1879, it was agreed that all questions and matters in difference between them with respect to the plaintiff's alleged right to a lease from the defendant, for a term of twenty-one years, of the mansion known as 20, Grosvenor Square, should be referred to the award of John Smith, of 13, Brook Street, to whom full power over the costs of the reference and award was given.

Under the Judicature Acts, officers attached to the High Court have been appointed, called official referees, and by the rules, the Court or a judge may refer certain classes of cases to them. Under Order 36 of the Rules of the Supreme Court, 1883, the Court or a judge may direct the trial by a judge without a jury of any matter or issue requiring a prolonged examination of documents or accounts, or any scientific or local investigation ; but by rule 10 of the Order it is provided : " Nothing in this Order shall affect any proceeding under any of the provisions of the Common Law Procedure Acts relating to arbitrations." And it was pointed out in *Cruickshank v. Floating Swimming Bath Co.* (1 C. P. D. 260 ; 45 L. J. C. P. 684 ; 34 L. T. 733 ; 24 W. R. 614) that the old law and practice with regard to references to arbitration were in no way affected by the Judicature Acts.

Judicature
Acts do not
affect
old law
as to
arbitra-
tions.

2. The said John Smith took upon himself the burden of the said reference, and having heard the parties, duly published his award on the 3rd of August, 1879, by which he directed the defendant forthwith to execute a lease of the said premises to the plaintiff for the said term of twenty-one years, and further directed that the defendant should pay to the plaintiff all his costs of the reference and the award.

3. The defendant refuses to execute the said lease, and has not paid the said costs, or any part thereof.

The plaintiff claims, (1) that the defendant may be ordered to execute the said lease of the said premises to the plaintiff, and to specifically perform the directions of the award in that regard ; (2) the costs of the said reference and award.

Bail.

Action on a Bond against a Surety for a Defendant's paying a Penalty sued for (a).

1. By an order of the High Court of Justice dated and made in an action by the now plaintiff against X. Y., it was ordered that the said X. Y. should be imprisoned unless he

Arrest
before
judgment.

(a) Arrest on mesne process has been abolished, but by the Debtors Act, 1869 (32 & 33 Vict. c. 62) section 6, it is enacted: "Where the plaintiff, in any action in any of Her Majesty's superior courts of law at Westminster, in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath to the satisfaction of a judge of one of those courts, that the plaintiff has good cause of action against the defendant to the amount of £50 or upwards; and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such judge may, in the prescribed manner, order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court.

"Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison."

should deposit in Court £200 by way of security, or give to the plaintiff a bond executed by him and two sureties in the penalty of £400 that any sum recovered against him (X. Y.) in that action should be paid, or that he should be rendered to prison.

2. The defendant as such surety executed and gave to the plaintiff the said bond.

3. The plaintiff recovered judgment in that action for £200 and £77 costs. No part of the said sums has been paid to the plaintiff, nor has the said X. Y. been rendered to prison.

The plaintiff claims £277.

Action on a Bond against a Surety for a Debtor's remaining in England.

1. On the 15th of January, 1883, by an order of the High Court of Justice made in an action brought by the now plaintiff against A. B. to recover £100, it was ordered that the said A. B. be arrested and imprisoned for six months, unless he should deposit in Court £ as security, or give to the plaintiff a bond executed by him and two sureties in the penalty of £200, that he (A. B.) would not go out of England without the leave of the Court.

2. The defendant executed and gave to the plaintiff the said bond as one of such sureties.

3. On January 18, 1883, A. B. went out of England without the leave of the Court.

4. The plaintiff obtained judgment in his said action against A. B., but the judgment debt and costs (£115 in all) are unpaid.

The plaintiff claims £115.

Applications under either of the sub-sections of section 6 are made at chambers, *ex parte*, to a judge. In practice it is difficult to get orders under the first sub-section, owing to the difficulty of satisfying the judge that "the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action." (*M'Blair v. Weir*, 7 Ir. R. C. L. 526.) The order can only be made before final judgment is signed. (*Yorkshire Engine Company v. Wright*, 21 W. R. 15.) The defendant cannot be kept in prison after final judgment has been signed. (*Hume v. Drayff*, L. R. 8 Ex. 214; 42 L. J. Ex. 145; 29 L. T. 64; *Waine v. Wilkins*, L. R. 8 Q. B. 107; 42 L. J. Q. B. 95; 27 L. T. 825.)

Bailments (a).

Action for misusing a Horse and Dogcart hired by the Defendant.

1. On the 1st of June, 1883, the defendant hired of the plaintiff a horse and dog-cart to carry him, the defendant, only, from M. to C. and back.

What is a bailment.

(a) A bailment is constituted by the delivery or transfer of a chattel from one person to another, in order that something may be done with it, either for the benefit of the owner or of the party who receives it as the temporary possessor, or for the mutual benefit of both of them, and the word is applied to contracts for the letting and hiring of chattels, as well as to contracts for the delivery of them to persons for safe custody, or to workmen to be worked upon or dealt with in the course of their employment.

Liability of a hirer of chattels.

Liability of hirer of chattels.]—The hirer of a chattel is bound to use it in a proper and reasonable manner, to take the same care of it that a prudent and cautious man ordinarily takes of his own property, and to return it to the bailor at the time appointed for its return, or within a reasonable period after request, if no such time has been fixed, in as good condition as it was at the commencement of the bailment, subject only to the deterioration produced by ordinary wear and tear and reasonable use, and by injuries caused by accidents which have happened without any default or neglect on the part of the hirer.

If the chattel is secretly stolen, the hirer is liable, unless he proves that he took such precautions for its safety as a prudent man ordinarily takes. In case of robbery, the hirer must show that it was taken by force. If the chattel is destroyed by fire or perishes, the hirer is not liable if he has not been guilty of neglect or want of due care. (*Taylor v. Caldwell*, 32 L. J. Q. B. 164.) A hirer of a ship for a particular voyage will not be liable for her loss in a storm unless he has deviated from the ordinary course, and needlessly encountered risks not contemplated by the owner at the time of the hiring.

Whenever a chattel bailed to a hirer has sustained a partial injury through an inherent defect in the article itself, or by reason of some inevitable accident, which threatens its total and immediate destruction, and the effects of such partial injury may be obviated, and the chattel preserved for future use by repairs promptly provided, there is an implied authority from the owner to the hirer to order the necessary repairs, and incur the necessary expense. (See Addison, Contr., 7th ed. 619, 620.)

Of a borrower of chattels.

Liability of gratuitous borrower of chattels.]—There are two kinds of gratuitous loan of chattels, viz., the *mutuum*, or loan of things which are consumed in the use, or the use of which puts it out of the borrower's possession, such as wine or corn, and the *commodatum*, or loan of a chattel which is not destroyed by the use, such as a horse or carriage. In the former case the liability is to return an equivalent in value or quality. In the latter, viz., the *commodatum*, the borrower is bound to return the chattel in as good a condition as when it was borrowed, subject only to the deterioration resulting from inherent defects or produced by ordinary wear and tear, and the reasonable use of it for the purpose for which it was known to be required. But the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender, and if guilty of the least neglect, will be liable for injury or loss. (*Coggs v. Bernard*, 1 Sm. L. C. 188, 6th ed.) He is bound to that

2. The plaintiff has suffered damage by the defendant's breach of contract.

3. The breach of contract was in driving from M. to D., and driving four persons at a furious pace.

degree of care and diligence which *the most prudent man* exercises with regard to his own property. But he cannot be made liable for inevitable accidents or casualties he could not have foreseen, and which no human prudence could have guarded against. If a horse is put into his stable by the borrower and is stolen therefrom, the borrower is not liable, unless he or his servant has left the door of the stable open. (*Coggs v. Bernard*, 2 Ld. Raym. 916; Doctor and Student, Dialogue 2, ch. 38.)

If a person use a thing lent to him for another purpose than he stated to the lender when borrowing it, then he will be liable for an injury or accident to it while so used, even without the least neglect. Where a horse is lent for an ordinary journey, if the borrower travel by bye-ways dangerous to the horse's footing, he is liable in the event of accident; but if a horse is lent to a person to ride it at a hunt, the borrower is not liable for an accident to it while being ridden at the hunt after the usual fashion, as the risks must have been in the contemplation of the lender. (*Williams v. Jones*, 33 L. J. Ex. 297.)

Liability of pawnbroker.—If the chattels pawned be such as will be deteriorated by wear, the pawnee may not wear them; but if not such as are damaged by wearing, as jewellery, the pawnee may wear them subject to liability, if they are stolen or robbed from his or her person, whereas he would not be liable if stolen from the proper place for depositing such things for safe custody. The pawnee is bound to use ordinary diligence (the *media diligentia* of the Roman law); and if he uses such diligence he is not liable in the event of loss or injury, and may claim the amount of the advance from the pawner. (*Donald v. Suckling*, L. R. 1 Q. B. 585.) If, however, the principal and interest are tendered to the pawnbroker and he does not deliver them, he then becomes absolutely liable in the event of loss or injury, apart from any question of negligence, as he became a wrongdoer by detaining them. (*Maughan v. Sharpe*, 34 L. J. C. P. 19.)

Liability of a pawnbroker.

Liability of gratuitous mandatory.—The mandatory is liable for damage caused by his neglect, after he has undertaken to do something to goods and entered on the doing of it. (See *Coggs v. Bernard*, 1 Sm. L. C. 6th ed. 188.) But he is not responsible for neglecting to do what he has merely undertaken to do. (*Ib.*)

Of a gratuitous mandatory.

Liability of paid mandatory.—Paid mandatories are divided into two classes, viz., 1. Those exercising a public employment in virtue of which they receive the chattel, such as common carriers, hoymen, &c., as to whom the law is that they are liable at all events, being insurers. (See *post*, Carriers.) 2. Private persons to whom the thing is delivered to have it carried or something else done with it. These mandatories are bound to use the best diligence they can, and are not liable should the chattel be stolen, lost or injured notwithstanding. But if a warehouseman should contract to warehouse goods in one corner of his warehouse and should warehouse them in another corner, he is liable for any loss, unless the same loss would have happened if they had been kept in the place agreed upon. (*Tilley v. Doubleday*, 7 Q. B. D. 610; 44 L. T. 814; 51 L. J. Q. B. 310.)

Of a paid mandatory.

Although in certain cases a bailee may set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against his bailee. (*Ex parte Davis, re Sadler*, 19 Ch. Div. 86.)

Particulars of damage :

June 1, 1883.	Value of horse destroyed	. £50	0	0
July 1, 1883.	Mr. Smith, veterinary surgeon	10	10	0
July 1, 1883.	Mr. Jones, repairs to dog-cart	6	5	0
		£66 15 0		

The plaintiff claims £66 15s.

Injury to Goods pawned to Defendant.

1. On January 1st, 1883, the plaintiff pawned certain furs and sables with the defendant.

2. The plaintiff has suffered damage by the defendant's negligence in keeping the said furs in a damp cellar and the said sables in a drawer open to and infested by moths.

3. On payment of the sum secured the defendant delivered the said furs and sables to the plaintiff in a damaged condition.

Particulars of damage :

40 sets of furs at £3		£120
12 sets of sables at £5		60
		£180

The plaintiff claims £180.

Defence.

The defendant says that :

1. The furs and sables were not pawned to the defendant, but received by him to be gratuitously stored in his shop at the plaintiff's request.

2. They were moth eaten and injured by damp when received by the defendant.

3. The defendant did not keep the furs or any of them in a damp cellar, nor did he keep the said sables or any of them in a drawer open to or infested by moths.

4. If the defendant kept the furs or any of them in a damp cellar, he did not know and had no reason to believe that the cellar was damp. The dampness (if any) of the cellar was

caused by an extraordinary accident—the bursting of a main water pipe.

5. The defendant took reasonable care to protect the sables against moths by locking them up in a box within the drawer.

Injury to Goods in Furnished Apartments by Lodger.

1. On June 10th, 1883, the plaintiff let three furnished rooms at No. —, High Street, London, for three months, at a weekly rent of 30s.

2. The plaintiff has suffered damage from injuries to the furniture in the said rooms, caused by the defendant breaking and destroying one table and four chairs, and damaging one pianoforte there during his tenancy.

3. When the defendant's tenancy expired two weeks' rent was and still is due.

Particulars of damage :—

(1.) Value of one table	£8 10 0
(2.) Value of four chairs	8 0 0
(3.) Messrs. Broadwood's charges for re- pairing pianoforte	15 0 0
(4.) Deterioration in value of piano- forte	20 0 0
	£51 10 0

The plaintiff claims £51 10s. damages and £3 for arrears of rent.

Defence and Counter-claim.

Defence.

The defendant says that :

1. He denies that he broke or injured any of the articles of furniture mentioned in the statement of claim.

2. When his tenancy expired not two weeks' rent, but one week's rent only, *i.e.* 30s., was due.

Counter-claim.

The defendant says that :

1. The tenancy was not for three months but by written

agreement a monthly tenancy determinable by a month's notice to quit.

2. Neither plaintiff nor defendant gave any notice to quit, but on the 10th of September, 1883, the plaintiff excluded the defendant from the premises and the defendant was thereby put to expense and inconvenience in procuring other lodgings.

3. The said expense was 10s. 6d. in cab hire, and £3 3s. for increased rent.

4. On the 10th of September, 1883, there were in the said furnished lodgings at No. —, High Street, London, two boxes containing wearing apparel, books, surgical instruments, and other articles, all the property of the defendant.

5. The plaintiff detains the said boxes and their contents from the defendant and refuses to give up the same.

[*If any special damage is claimed, add*]

Particulars. [*Fill them in.*]

The plaintiff claims £—— and the return of the boxes and their contents, or £——, their value, and £—— damages.

Reply.

The plaintiff, as to the defence, says that :

1. She joins issue.

As to the counter-claim, she says that :

1. On September 3rd, 1883, the plaintiff and the defendant agreed that the said tenancy should cease on September 10th, 1883.

2. The plaintiff does not admit that she ever excluded the defendant from the premises.

3. As to paragraphs 4 and 5, the plaintiff claims a lien upon the boxes and their contents for unpaid rent. She is and always has been willing to give them up on payment of the said rent.

Rejoinder.

The defendant joins issue upon the plaintiff's reply.

Negligent keeping of Goods delivered into the custody of a Furniture Broker.

1. On July 1st, 1883, the plaintiff deposited certain household furniture with the defendant to be by him for reward safely kept in his furniture repository.

2. The plaintiff has suffered damage by the negligence of the defendant in the keeping of the said goods.

3. The defendant carelessly placed certain dangerous and inflammable materials near the said furniture and effects, and the said goods were thereby wholly destroyed by fire.

The plaintiff claims £1000.

Defence and Counter-claim.

Defence.

The defendant says that :

1. The defendant used reasonable care to keep the plaintiff's furniture safely.

2. The defendant denies that he carelessly or at all placed dangerous or inflammable materials near the said furniture. If he did, he did so in the reasonable belief that the said materials were not dangerous or inflammable.

3. The fire which consumed the plaintiff's said furniture and effects was caused by the act of God, viz., lightning.

Counter-claim.

The defendant says that :

1. The plaintiff agreed to pay to the defendant the sum of £10 10s. per month to warehouse the said furniture. The defendant warehoused them from July 1, 1883, until January 1, 1884.

The defendant claims £63.

Negligence of Bailees in not taking proper Care of Wine in their Warehouse.

1. In the year 1881 the plaintiffs lodged with the defendants, the G. & S. Wharves Co., Limited, to be warehoused

in their bonded warehouses, 50 hogsheads of wine, upon the terms that the company should be responsible for any excessive losses upon such wines according to the rules in force with store companies, and that the said company should take proper care for the safe preservation of the wine.

2. The defendants, Messrs. E. B. & Co., in the year 1883, commenced and have continued till now to work the business carried on by the company, and the plaintiffs permitted their wine to remain in the warehouses.

3. Both before and since the date of the said change the said company and Messrs. E. B. & Co. were negligent in taking charge of the said wine, and drew, or suffered to be drawn, wine from the plaintiffs' casks, and the casks to be filled up with water or other liquids.

4. The drawing off of the wine has caused an excessive loss within the meaning of the said agreement, and has damaged the rest of the wine. Twenty-five hogsheads of the said wine have been confiscated by Her Majesty's Customs, in consequence of the said excessive loss, and the remainder is liable to be confiscated.

Particulars of damage :

1883.	25 hogsheads confiscated .	.	£2500
1883.	25 hogsheads damaged .	.	500
			£3000

The plaintiff claims £3000 damages.

Defence of G. & S. Wharves Co., Limited.

The said defendants say that :

1. On the 1st July, 1883, they transferred the said bonded warehouses and the business of warehousmen, to the defendants Messrs. E. B. & Co., to whom the said wine of the plaintiffs was then delivered with the consent of the plaintiffs, who have since dealt with the defendants Messrs. E. B. & Co., and not with this company.

2. Neither the said defendants nor the defendants E. B. & Co. have been negligent in taking charge of the said wine, or drew, or suffered to be drawn, wine from any of the plaintiffs' casks

or allowed the casks to be filled up with water or other liquid.

3. An excessive loss within the meaning of the said agreement has not been caused, nor has the character of any of the contents of any of the casks been damaged or altered. No part of the said wine has been confiscated by Her Majesty's Customs, nor is any part of the same now liable to be confiscated.

Defence of Messrs. E. B. & Co.

The said defendants say that :

1. On the 1st July, 1883, the defendants G. & S. Wharves Co., Limited, transferred the said bonded warehouses and the business of warehousemen to the defendants Messrs. E. B. & Co. ; and the said company then delivered to the defendants Messrs. E. B. & Co. a quantity of wine which had been lodged with the said Company upon the terms stated in the statement of claim.

2. Neither the defendants, Messrs. E. B. & Co., nor the defendants, the G. & S. Wharves Co., have been negligent in taking charge of the said wine, or drew, or suffered to be drawn, wine from any of the plaintiffs' casks, or the casks to be filled up with water or other liquid.

3. An excessive loss within the meaning of the said agreement has not been caused, nor has the character of any of the contents of any of the casks been damaged or altered. No part of the said wine has been confiscated by Her Majesty's Customs, nor is any part of the same now liable to be confiscated.

Negligence of Packers in packing Silk.

1. The plaintiffs have suffered damage by the negligence of the defendants in packing fourteen bales of Chinese raw silk.

2. On the 10th of October, 1883, the plaintiffs employed the defendants for reward to pack the said silk in original wrappers for conveyance, as the fact was and as the defendants had notice, to the purchasers of the said silk at Lyons in France.

3. The defendants did not pack the said silk in original

wrappers, but in inferior wrappers, so that the silk deteriorated in value, in consequence whereof the said purchasers lawfully refused to accept delivery of the silk.

4. The defendants afterwards agreed to buy the said silk from the plaintiffs for £1000, and to indemnify the plaintiffs against all losses sustained by them in respect of the non-fulfilment of the contract of the sale to the purchasers first mentioned.

5. The defendants have refused to accept delivery of, or to pay for, the said silk, or to indemnify the plaintiffs as aforesaid.

Particulars of damage and expenses :

Date 1.	Carriage to Lyons and back . . .	£98
„ 2.	Damages paid the purchasers, X. Y. and Z. at Lyons . . .	50
„ 3.	Loss on re-sale of the silk to A. B. .	170
		£318

The plaintiffs claim £318.

Defence.

The defendants say :

1. On the 10th October, 1883, the defendants undertook to pack in original wrappers thirteen bales of silk, but not fourteen bales. One of the fourteen bales had been previously delivered to the plaintiffs, packed in a Hessian bag.

2. The defendants had not notice, and they do not admit that the said thirteen bales of silk were to be packed in original wrappers, for the purpose of forwarding the same to Lyons in France, in fulfilment of a contract made by the plaintiffs for the sale thereof or otherwise, and the defendants do not admit that such contract was made.

3. On or about the 28th December, 1883, the plaintiffs required the defendants to deliver the said thirteen bales of silk to Messrs. N. H. and Co., which the defendants did.

4. The defendants did not agree to purchase the said silk, or to indemnify the plaintiffs against any losses.

5. The defendants have paid the sum of £21 into Court in

respect of the cause of action admitted, and say that the said sum is enough to satisfy the plaintiffs' claim in respect thereof.

Bankers (a).

Action against Bankers for Dishonouring a Customer's Cheque.

1. On May 18th, 1883, the defendants, who are bankers, had £500 at their bank, and in their hands, belonging to the plaintiff, who is a trader.

2. On May 18th, 1883, the defendants refused to pay a cheque

(a) If a banker refuses to pay a cheque drawn upon him by a customer, who keeps an account with him, and who has sufficient assets in the hands of the banker to meet the cheque at the time it is presented for payment, the customer is entitled to recover substantial damages without proof of actual damage, as the dishonouring of a cheque is likely to be very injurious to the credit of persons. (*Holin v. Steward*, 23 L. J. C. P. 148.)

Liability of a banker dishonouring customer's cheque.

It has been held that the different banks of a banking company are, as regards their separate customers, separate companies, so that a customer who keeps an account with one branch has no right to draw cheques on, and have them cashed by another branch: (*Woodland v. Fear*, 26 L. J. Q. B. 202; 7 E. & B. 519.) Therefore where A. received payment for a cheque drawn on branch C. at branch D., and the cashier paying at the latter did not know, as was the fact, that the account of the drawer of the cheque was overdrawn at branch C., it was held that A. must refund the amount of the cheque. (S.C.) Generally as to the practice of branch banks, see *Prince v. Oriental Bank*, 3 App. Cas. 325; 47 L. J. P. C. 42; 38 L. T. 41, 26 W. R. 543. For some purposes, however, it would seem that branch banks are not regarded as distinct. Thus where a customer had an account with two branches of a bank, it was held that in the absence of any special agreement with their customer, the bank had a right to consider the two accounts as one, and to refuse the customer's cheque, when on adding the two accounts together the balance was against him. (*Garnett v. McKewan*, L. R. 8 Ex. 10; 42 L. J. Ex. 1; 27 L. T. 560; 21 W. R. 57.)

Branch banks.

But if a banker pays the cheque of a customer erroneously supposing that he had funds, he cannot recover the amount from the person to whom the cheque is paid. (*Chambers v. Miller*, 32 L. J. C. P. 30.)

Where a customer pays into his bankers a sum of money to meet a bill, and the bankers undertake to apply the money to the payment of the particular bill, but afterwards fail to do so, and dishonour the bill when presented to them, the customer may, but the holder of the dishonoured bill may not, have an action against them. (*Moore v. Bushell*, 27 L. J. Ex. 3.) It has been suggested that in such a case the holder of the bill would have a remedy in equity as a matter of trust. (Story's *Equity Jurisprudence*, vol. 2, pp. 288 to 291; but see the decision of *Malins, V.-C., contra*, in *Hill v. Royds*, L. R. 8 Eq. 290.)

As to right of party other than customer to sue banker.

If a banker pays a forged cheque he will generally have to bear the loss himself; and if he pays a cheque which has been fraudulently altered in amount he will have to suffer, unless the drawer has by his

for £300, drawn by the plaintiff in favour of Messrs. W. and L., and presented for payment, and they marked "No assets" on the said cheque, whereby the plaintiff has suffered damage.

The plaintiff claims £1000.

Action by Bankers on an Overdrawn Account.

Between August 1st, 1881, and September 29th, 1883, the plaintiffs, who are bankers, lent divers sums of money to the defendant, and paid divers sums of money at the defendant's request, and to his use, amounting in all to £271 10s., which, with £27 1s. for interest, and £4 4s. for commission, agreed to be paid, is now due by the defendant to the plaintiffs.

Particulars, which exceed three folios, were delivered to the defendant before action.

The plaintiffs claim £302 15s.

Defence.

The defendant says that :

1. On October 15th, 1883, four bills of exchange for £35 each, dated October 13th, 1883, each accepted by John Smith, and drawn by John Jones, were indorsed by the defendant, and accepted by the plaintiffs in discharge of the alleged cause of action.

Payment of
forged
cheques by
bankers.

negligence facilitated the commission of the fraud. (Byles on Bills, 12th ed., p. 336.) This is the general rule, but by the 16 & 17 Vict. c. 59, s. 11, if a draft or order (which includes a cheque) drawn upon a banker for a sum payable to order or demand, when presented for payment, purports to be indorsed by the person to whom the same is drawn payable, that is a sufficient authority to the banker to pay the amount to the bearer, although the signature indorsed be in fact a forgery. But this enactment does not protect any other person than the banker on whom the draft or order is drawn ; it does not protect any third banker who cashes it on the faith of the indorsement. (See *Ogden v. Benas*, L. R. 9 C. P. 513 ; 43 L. J. C. P. 259 ; 30 L. T. 683 ; 22 W. R. 805. Cf. *Charles v. Blackwell*, 2 C. P. D. 151 ; 46 L. J. C. P. 368 ; 36 L. T. 195 ; 25 W. R. 472. As to the liabilities of bankers and others paying cheques in disregard of general or special crossings on them or of the words "not negotiable" on them see the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, ss. 76—82), and *Matthiessen v. London & County Bank*, 5 C. P. D. 7 ; 41 L. T. 35 ; 48 L. J. C. P. 529 ; 27 W. R. 838.

Bankers have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract or circumstances that show an implied contract inconsistent with the lien. *Brandon v. Barnett*, 12 Cl. & Fin. 787 ; *London Chartered Bank of Australia v. White*, 4 App. Cas. 413 ; 48 L. J. C. P. 75.

2. Alternatively the defendant compounded with his creditors, under the 126th section of the Bankruptcy Act, 1869, and duly tendered to the plaintiffs the composition on the day appointed.

3. The defendant has paid into Court the sum of £15 7s., the amount of the said composition, and says that sum is enough to satisfy the plaintiffs' claim.

Action against Bankers for Dishonouring Customer's Cheque, setting out a special Undertaking that it should be paid.

1. The plaintiff, who is a trader, and a customer of the defendants, who are bankers, has suffered damage by the defendants' breach of a contract to apply a sum of £120 9s. 8d., paid on August 31st, 1883, by the plaintiff to the defendants, in honouring a cheque for that amount, which the plaintiff was about to draw in favour of Messrs. A. & Co.

2. On September 1st, 1883, the said cheque was presented by Messrs. A. & Co. to the defendants for payment, and by them dishonoured.

The plaintiff claims £1000.

Defence and Counter-claim.

Defence.

The defendants say :

1. They deny that they ever agreed to apply the sum of £120 9s. 8d., referred to in the statement of claim, or any other sum in honouring a cheque for that or any other amount drawn, or to be drawn, by the plaintiff in favour of Messrs. A. & Co.

2. When the cheque referred to in the statement of claim was presented, the plaintiff's account with the defendants was overdrawn to an amount exceeding £2000.

3. The said sum of £120 9s. 8d. was on August 31st, 1883, paid by the plaintiff to the defendants to the general credit of the plaintiff's banking account, and upon which the plaintiff was then indebted to the defendants in a sum of £2573 11s. The defendants, on August 31st, 1883, placed the said sum of

£120 9s. 8d. to the general credit of the plaintiff's said banking account, and appropriated the same in part payment of the said sum of £2573 11s.

Counter-claim.

The defendants say that :

1. Between the months of April and August, 1884, the defendants advanced and lent to the plaintiff, and the plaintiff borrowed and received from the defendants sums of money amounting, along with the agreed rate of interest, in the whole to the sum of £1705. Full particulars have been delivered to the plaintiff before action.

The defendants claim £1705.

Action by Bankers to recover the amount of a Cheque paid by Mistake.

1. The plaintiff is the public officer of the C. & C. Banking Company, which has its principal place of business at C. and independent branches at P. and A.

2. On April 25th, 1883, the said company, by its servant at its P. branch, on the credit of the defendant, and at his request, cashed a cheque for him and paid to him £392. The said cheque was drawn by one J. W. on the A. branch. When it was presented J. W. was largely indebted to the company, and the said cheque was dishonoured.

The plaintiff claims £392 and interest thereon.

Defence.

The defendant says :

1. He denies that the branches at A. and P. are independent of one another or of the company's principal place of business at C.

2. The cheque was not drawn on the A. branch but on the company generally.

3. The cheque was not cashed by the company's servant on the credit or at the request of the defendant but in the ordinary way of business.

4. When it was presented and paid J. W. was not at all indebted to the company. The company was indebted to him in a sum more than sufficient to meet the cheque.

5. On April 25th, 1883, the company received from J. W. the sum of £2466 18s. 6d. on the terms that it should be applied in meeting the said cheque and certain other cheques.

Bankruptcy (a).

Action by Trustees in Bankruptcy for a Debt due to the Bankrupt.

1. The plaintiff is the trustee of the estate of G. K., who was on the — of —, 1883, adjudicated a bankrupt in the Croydon County Court.

(a) *Actions by trustees in bankruptcy.*—By the joint operation of the 44th, 50th and 54th sections of the Bankruptcy Act of 1883, all the property of a bankrupt divisible among his creditors as defined by the 44th section, including choses in action, becomes absolutely vested in the trustee on his appointment. His title relates back to the act of bankruptcy on which the receiving order was founded, or if there have been several acts of bankruptcy within three months before the date of the presentation of the petition, then to the first of such acts. See s. 43 of the Bankruptcy Act, 1883. As to relation back in case of non-payment of debt under debtors' summons, for which a bankruptcy notice is now substituted, see *Ex parte Weir*, L. R. 6 Ch. 875.

Property vested in trustee.

Relation back of his title.

By sect. 50, par. 5, "Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee." By s. 54, par. 2, "on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed."

By sect. 83 the trustee may sue and be sued by the official name of "the trustee of the property of * * * a bankrupt."

Name in which the trustee sues.

Under former bankruptcy statutes, it was held that where the appointment of an assignee was duly vacated, and a new assignee was appointed, the latter became assignee from the first appointment by relation. (*Aldrett v. Kettridge*, 1 Bing. 355.) There seems to be scarcely room for the application of this doctrine under the present law, as by the 54th section, sub-sect. 3. "the property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office without any conveyance, assignment, or transfer whatever."

A right of action to set aside an absolute conveyance and declare it a mortgage (*Secar v. Lawson*, 15 Ch. Div. 426; 49 L. J. Bank. 69), and an option which the bankrupt has to take a lease, pass to his trustee. (*Buckland v. Papillon*, L. R. 2 Ch. 67, and see *Simpson v. Bathurst*, L. R. 5 Ch. 193, 202; 22 L. T. 29; 18 W. R. 772, as to the power of renewing a lease vested in the bankrupt before adjudication.) And an assignment for value of the future receipts of the bankrupt's business does not

Interests of the bankrupt that pass to the trustee.

2. Before the said date the said G. K. sold and delivered goods to the defendant, of which particulars have been delivered to the defendant, the price whereof amounted to £85.

. The plaintiff claims £85.

prevent the trustee becoming entitled to them. *Ex parte Nicholls*, 22 Ch. Div. 782. Where property was given to an uncertificated bankrupt contingently on his obtaining his certificate, this right was held to pass on the happening of that event to the assignee. (*Davison v. Chalmers*, 33 L. J. Ch. 622.) Though this case was decided under the Act of 1861, it would apply under the present Act. Money paid away for value by an uncertificated bankrupt cannot be followed by the trustee, though the payee had notice of the bankruptcy. (*Ex parte Dewhurst*, L. R. 7 Ch. 185; 41 L. J. Bank. 18; 25 L. T. 731; 20 W. R. 172.) Nor can it be intercepted if merely paid into the hands of a stakeholder, he and his principal having no notice of the bankruptcy. (*Collins v. Stacey*, 11 Q. B. D. 142.)

Rights of action for breach of contract pass to trustee.

All rights of action for breach of contract liquidated or not pass to the trustee. (*Wright v. Fairfield*, 2 B. & Ad. 727.) The right to enforce unexecuted contracts which may be performed by the trustee on behalf of the bankrupt, and such as would pass to his executor if he died, will pass to the trustee. (*Gibson v. Carruthers*, 8 M. & W. 333.) But *semble* if the contract be one with the bankrupt, his executors, and administrators, the right to complete it would not pass to the trustee (*Knight v. Burgess*, 33 L. J. Ch. 727), if the element of personal skill arises in such a case.

Where the right of action of the bankrupt's wife is such that if vested in the bankrupt alone it would pass to the trustee, the interest of the bankrupt in such right of action passes to the trustee. (*Richbell v. Alexander*, 30 L. J. C. P. 268.) Since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), such cases have become very rare.

When rights of action for tort pass to trustee.

The right of action arising out of certain torts committed against the bankrupt before adjudication passes to the trustee; in other cases it does not; the test being, was the wrong one which was personal to the bankrupt, and for which he would be entitled to a remedy whether his property was impaired or not? in which case the cause of action does not pass to the trustee, but remains in the bankrupt. Or was a pecuniary loss and damage to the estate the substantial and primary cause of action? in which case it passes to the trustee, though involving personal inconvenience to the bankrupt. (*Wetherell v. Julius*, 10 C. B. 267.) Thus a right of action for trespass to a dwelling-house, and disturbing the bankrupt in the enjoyment of it by which he was prevented carrying on his business was held not to pass to the assignee. The right of action for a wrongful dismissal passes to the trustee, and formerly did to the assignee (*Beckham v. Drake*, 2 H. L. C. 579). In the case of *Wetherell v. Julius*, *supra*, the distinction was drawn between a right of action against a solicitor for negligence occasioning the arrest of the bankrupt, and negligence leading to a sequestration of the profits of the bankrupt's business; in the former case the cause of action not devolving, but in the latter passing to the trustee. On the principle of this distinction it was held that an action for negligence against a solicitor, in consequence of which the client had a judgment passed against him, and was adjudicated bankrupt passed to the assignee. (*Crawford v. Cinnamon*, L. R. 1 C. L. 325, Ex.) So a right of action for misrepresentation whereby the plaintiff lost £2,000, and was in consequence adjudicated bankrupt, though involving personal annoyance, trouble, and discredit, was held to pass. (*Hodgson v. Sydney*, L. R. 1 Ex. 313.) In this case Lord Bram-

Action by Trustee in Liquidation.

1. A. M. and L. M. (hereinafter called the debtors) presented their petition in the London Bankruptcy Court for the liquida-

well suggested that the same tort may have two different characters, one giving the trustee a right of action on behalf of the estate, and the other giving the bankrupt a right of action on account of the personal injury. This it must be remembered is not a decision but only a *dictum*, and with the utmost deference for so high an authority there appear some practical difficulties in the way of applying such a doctrine. There is no analogy between such a case and one where a tort, such as a libel, is committed, affecting a number of persons, each of whom may claim damages, for here the injury is only committed against one person, and the suggestion is that you are to allow that person to be as it were multiplied for the purpose of creating separate torts.

One of the most frequent subjects of controversy in suits for the detention or conversion of chattels, by as well as against the trustees of bankrupt estates is the "order and disposition clause" (sect. 44, sub-sect. 3, of the Bankruptcy Act, 1883.) The subject is too large to be dealt with in a work of this scope, and, indeed, it scarcely comes within it. The law on the subject will be found very clearly and comprehensively stated in "*Roche & Hazlitt's Bankruptcy Law*." It is well, however, to notice that *things in action* other than debts due to the bankrupt in the course of his trade or business, are not goods and chattels within the meaning of that clause, which it may be stated relates to traders and non-traders. Shares in public companies are not choses in action for this purpose. (*Ex parte Union Bank of Manchester*, L. R. 12 Eq. 354; 40 L. J. Bank. 57; 24 L. T. 951; 19 W. R. 872.) But a share in an ordinary partnership is such a chose in action (*Ex parte Fletcher*, 8 Ch. Div. 218; 26 W. R. 439; 47 L. J. Bank. 70; 38 L. T. 229); and so is a policy of insurance. (*Ex parte Ibbetson*, 8 Ch. Div. 519; 39 L. T. 1; 26 W. R. 843.)

Order and disposition clause.

In certain transactions between the bankrupt and others, where the bankrupt disposes of goods, &c., after an act of bankruptcy has been committed, the trustee has the option either of adopting the contract made by the bankrupt, and suing the party in an action *ex contractu*, or of disaffirming the contract, and suing the person dealing with the bankrupt for conversion or detainue. In such cases if the trustee adopts the transaction, he cannot afterwards treat the other party to the transaction as a wrongdoer. (*Smith v. Baker*, L. R. 8 C. P. 350; 42 L. J. C. P. 155; 28 L. T. 637; and see *Marks v. Feldman*, L. R. 5 Q. B. 275, Ex. Ch.; 39 L. T. Q. B. 101; 10 B. & S. 371.) Where there has been a collusive sale or transfer of goods by the bankrupt in contemplation of bankruptcy, there is no conversion without a demand and refusal, *unless the sale amounts to an available act of bankruptcy*, as the property is transferred subject to the transfer being avoided. (See *Stevenson v. Newnham*, 22 L. J. C. P. 110, Exch.) But if the goods have been converted into money an action for money had and received is maintainable by the trustee, without prior notice of the disaffirmance of the sale or transfer of the goods. (*Heilbut v. Nerrill*, L. R. 5 C. P. 478, Exch.; 39 L. J. C. P. 245; 22 L. T. 662; 18 W. R. 898.) If the sale or transfer amount to an available act of bankruptcy, as a fraudulent preference (sect. 4, sub-sect. (c)), then immediately on the adjudication, it is avoided by reason of the relation back of the title of the trustee to the act of bankruptcy if within three months before the presentation of the petition; it is then a dealing with the property of the trustee, and absolutely void. But the right above referred to of disaffirming any prior

When the trustee may affirm or disaffirm dealings of the bankrupt.

tion of their affairs by arrangement or composition with their creditors on the 2nd of December, 1882, and the plaintiff was appointed trustee of their estate.

fraudulent preference is quite distinct from the right which he takes by virtue of the relation back of his title; in the former case the transaction standing good unless repudiated or disaffirmed, in the latter it being absolutely void. (See *Heilbut v. Nerill*, L. R. 4 C. P. 354, 359; *Marks v. Feldman*, L. R. 5 Q. B. 275, Exch.; 39 L. J. Q. B. 101; 10 B. & S. 371.) Although the assignment by a debtor of all his goods for a past debt is an act of bankruptcy, yet if there is no relation back to that act the trustee cannot, if there be no fraud in fact or any intention to prefer, disaffirm the transaction, or sue for the price of the goods if sold. (*Jones v. Harber*, L. R. 6 Q. B. 77; 40 L. J. Q. B. 59; 19 W. R. 248.)

Subject to those provisions of the Bankruptcy Act, 1883, which avoided certain executions, settlements, and fraudulent preferences, the following transactions are protected by the Act, section 49:

Protected
transac-
tions.

- (a) Any payment *by* the bankrupt to any of his creditors.
- (b) Any payment or delivery *to* the bankrupt.
- (c) Any conveyance or assignment by the bankrupt for valuable consideration.
- (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration.

Provided that *both* the following conditions are complied with, namely:—

1.—The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place *before* the date of the receiving order; and

2.—The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or conveyance was made, executed, or entered into has not, *at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice* of any available act of bankruptcy committed by the bankrupt before that time.

"Available act of bankruptcy." This would include an act only available by a particular person, *e.g.*, failure to comply with a bankruptcy notice. *Hood v. Newby*, 21 Ch. Div. 605.

"Notice" may be either express or implied, and notice of facts from which the commission of an act of bankruptcy could be reasonably inferred would be sufficient notice. (*Lucas v. Dicker*, 6 Q. B. D. 84; 54 L. J. Q. B. 190; 43 L. J. 429; 29 W. R. 115.) The effect of s. 49 is, in cases to which it applies, to limit the beginning of the trustee's title to the date of the receiving order, instead of to the act of bankruptcy, by relation back of his title, as in other cases.

Rights of
execution
creditors.

Much learning on the rights of execution creditors under the Bankruptcy Act, 1869, has been swept away by ss. 45 and 46 of the Bankruptcy Act, 1883, which makes it very difficult for an execution creditor to obtain a valid security. *Elegits* no longer extend to goods (Act of 1883, s. 146). Writs of *levari facias* are abolished (*ibid.*); and a sale of goods by the sheriff, under an execution, for an amount exceeding £20 must be public after four days' public advertisement of the sale, s. 145. A careful examination of s. 45, sub-sect. 2, will show that writs of *elegit* are still favoured by the law. A judgment creditor will still do well, where his debtor has real property, to issue his writ of *elegit* or, if the debtor's estate is equitable, to apply *ex parte* to a judge for the appointment of a receiver.

S. 45 of the Bankruptcy Act, 1883, provides (1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the

2. In the years 1881 and 1882 the debtors lent money to the defendant and paid moneys for the defendant at his request,

benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or the attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2) For the purposes of this Act an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or in the case of an equitable interest, by the appointment of a receiver. And by s. 46, where the goods of a debtor are taken in execution, and, before the sale thereof, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge.

Execution when completed.

Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding £20, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon, on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall, in all cases, acquire a good title to them against the trustee in bankruptcy.

An execution protected under these provisions may be an act of bankruptcy which may avoid a subsequent execution levied by the same creditor. (*Ex parte Dawes*, L. R. 19 Ex. 438; 44 L. J. Bk. 62; 32 L. T. 103; 23 W. R. 384.)

Where the seizure and sale of the debtor's goods is prior to any act of bankruptcy to which there is relation, the right of the execution creditor to retain the fruits of the execution is not, under the Act (1883), in general affected by a subsequent act of bankruptcy followed by adjudication, for he is a creditor holding security, and there is nothing in this Act as in that of 1849 to avoid such security. (*Slater v. Pinder*, L. R. 7 Ex. 95; 41 L. J. Ex. 66; 26 L. T. 482; 20 W. R. 441, Ex. Ch.; and see *Ex parte Roche*, L. R. 6 Ch. 795; 40 L. J. Bk. 70; 25 L. T. 287; 19 W. R. 1129; and *Ex parte Lovering*, L. R. 17 Eq. 452; 43 L. J. Bk. 58; 29 L. T. 897; 22 W. R. 365.)

The fact of a seizure and a sale amounting to an act of bankruptcy under s. 4 of the Act does not affect the execution creditor's right under s. 45, unless the case falls within the 46th section. If it fall within that section the sheriff may still sell, and if he receives no notice within fourteen days that a petition has been presented, he may pay the amount levied to the execution creditor, who is entitled to retain it unless he had notice of an act of bankruptcy prior to the seizure. (*Ex parte Villars*, L. R. 9 Ch. 432; 43 L. J. Bk. 76; 30 L. T. 348; 22 W. R. 603.)

A private sale by the debtor, being then in insolvent circumstances, to the execution creditor of goods seized to avoid a sale by the sheriff, is a

The rights of an execution creditor as against the trustee.

and the defendant agreed to pay interest at the rate of 5 per cent. per annum on all the said moneys.

The following are the particulars:

[Here follow particulars.]

fraudulent transfer under s. 4, and is not protected either by the 45th or 46th section, so that the trustee is entitled to recover them or their price. (*Ex parte Pearson*, L. R. 8 Ch. 667; 42 L. J. Bk. 44; 28 L. T. 796; 21 W. R. 688.) And the trustee is entitled to goods seized by the sheriff, if on the sale of them he would be entitled to the proceeds under the 46th section. (*Ex parte Rayner*, L. R. 7 Ch. 325; 41 L. J. Bk. 26; 26 L. T. 306; 20 W. R. 456.) The corresponding section of the Act of 1869 (the 87th section) was held not to apply to cases where *before seizure* the debtor delivered bills to the sheriff, which the execution creditor accepted in satisfaction of the judgment, and such payment was valid (*Ex parte Brooke*, L. R. 9 Ch. 301; 43 L. J. Bk. 49; 30 L. T. 103; 22 W. R. 395); nor where the money was paid *after seizure* and before sale, and the creditor agreed to take it on account of the debt. (*Stock v. Holland*, L. R. 9 Ex. 147; 43 L. J. Ex. 112; 31 L. T. 121; 22 W. R. 661.) But now such payments would almost certainly be held to be fraudulent preferences under s. 48 of the Bankruptcy Act, 1883.

This section very much extends the law of fraudulent preferences. Formerly, under the Act of 1869, many payments made by way of fraudulent preference by the debtor were saved because the creditor was ignorant of his insolvency. (*Butcher v. Stead*, L. R. 7 H. L. 839; 44 L. J. Bk. 129; 33 L. T. 541; 24 W. R. 463.)

Trustee and
a solvent
partner
suing
together.

Suits by trustee and solvent partner of bankrupt.]—By s. 113 of B. A. 1883, "Where a member of a partnership is adjudged bankrupt, the Court may authorize the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action or suit relates, shall be void; but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the Court directs."

It sometimes happens in cases of fraudulent preferences that the trustee and a partner of a bankrupt may maintain an action which the partners could not. These are cases where the trustee avoids the preference. (*Heilbut v. Nevill*, L. R. 5 C. P. 478; 39 L. J. C. P. 245; 22 L. T. 662; 18 W. R. 898, Ex. Ch.)

Claims by a trustee in bankruptcy as such shall not, unless by leave of the Court or a judge, be joined with any claim by him in any other capacity. (Judicature Rules. 1883, Order XVIII. r. 3.)

DEFENCES.—Denial of official character.]—By Order XXI. r. 5, if either party wish to deny the right of any other party to claim as trustee whether in bankruptcy or otherwise, he must deny it specifically.

When pay-
ment to a
person
having
committed
an act of
bank-
ruptcy

Payment.]—By the 49th section, payments made in good faith and for valuable consideration to a bankrupt before the date of the receiving order by a person not having at the time of such payment notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication are valid.

Mutual credits and set-off.]—By sect. 38, where there have been mutual credits, mutual debts, or other mutual dealings between a debtor, against whom a receiving order is made, and any other person proving or claim-

The plaintiff claims £—— and interest on the above balance from June 1st, 1882, till payment or judgment.

ing to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account and no more shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of any act of bankruptcy committed by such bankrupt, and available against him.

Set-off.

It has been held that this section includes a claim for unliquidated damages. (*Booth v. Hutchinson*, L. R. 15 Eq. 30; 42 L. J. Ch. 492; 27 L. T. 600; 21 W. R. 116.) The expression "mutual credit," applies to cases where the credits are such as must from their nature end in debts. (*See Naorogi v. Chartered Bank of India*, L. R. 3 C. P. 444; *Astley v. Gurney*, L. R. 4 C. P. 714, Ex. Ch.) And, therefore, where there is a mere deposit of property without authority to turn it into money the section does not apply. The section applies, although the bankrupt has a lien for the amount of the debt due to him (*Ex parte Barnett*, L. R. 9 Ch. 293; 43 L. J. Bk. 87; 29 L. T. 858; 22 W. R. 283); and notwithstanding an unknown act of bankruptcy. (*Elliott v. Turquand*, 7 App. Cas. 79.) The section only applies with reference to claims between the bankrupt himself and his creditor. (*Turner v. Thomas*, L. R. 6 C. P. 610; 40 L. J. C. P. 271; 24 L. T. 879; 19 W. R. 1170.) It does not apply to cases where one only of several joint debtors becomes bankrupt. (*New Quebrada Co. v. Carr*, L. R. 4 C. P. 651.)

What may be set off.

Actions by trustee under liquidation will disappear with liquidations, ss. 169, 170, of Bankruptcy Act, 1883; but as proceedings under pending liquidations are to continue, it may be noted that the title of a trustee under a liquidation relates back to the filing of the petition (*Ex parte Duignan*, 40 L. J. Bk. 33; L. R. 11 Eq. 604; 24 L. T. 237; 19 W. R. 711; affirmed in L. R. 6 Ch. 605; 40 L. J. Bk. 68; 25 L. T. 286; 19 W. R. 1127); and his title will relate back to an act of bankruptcy prior to the filing of the petition, in analogy to the case of bankrupts under ss. 11 and 17 of the Act of 1869. (*Ex parte Eyles*, L. R. 16 Eq. 99; 42 L. J. Bk. 55; 21 W. R. 574; *Ex parte Schulte*, 9 Ch. 409; 39 L. T. 478; 22 W. R. 462.) His title, therefore, is good against an execution creditor, who seizes the goods with notice of filing of the petition. (*Ex parte Duignan*, *supra*.) Property acquired by the debtor during the liquidation proceedings until he has obtained his discharge, or until the liquidation is closed, vests in the trustee. (*Ebbs v. Boulnois*, L. R. 10 Ch. 479; 32 L. T. 650; 23 W. R. 822; 44 L. J. Ch. 691.)

Actions by trustee in liquidation.

Actions by or against bankrupts.]—See *ante*, p. 157, as to what causes of action do not pass to the trustee on his appointment.

If a debtor obtains an order of discharge he is thereby released from all debts provable in the bankruptcy (with certain exceptions), and to an action upon any of these debts he may plead that the cause of action accrued before his discharge, and the bankruptcy. The excepted debts are those due (1) on recognizances; (2) Crown and revenue debts; (3) on bail bonds; (4) in respect of fraud or breach of trust to which the bankrupt was a party; (5) in respect of which he has obtained forbearance by any fraud to which he was a party. (Bankruptcy Act, 1883, s. 30.) But, apart from the order of discharge, on the making of a receiving order (s. 9) the official receiver is thereby constituted receiver of the property of the debtor, and thereafter, except as directed by the Act, no creditor to whom the debtor is indebted in respect of any debt provable in bank-

Action by a Trustee in Bankruptcy for Damages for Breach of Contract made with the Bankrupt.

1. The plaintiff has suffered damage by breach of contract for sale and delivery by the defendant to A. B. of 1000

rupty shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose. Any creditor so proceeding might be summarily restrained by injunction.

A discharge granted to a debtor who is a member of a firm, in his separate bankruptcy, releases him from his joint as well as his separate debts. (*Ex parte Hammond*, L. R. 16 Eq. 614; 42 L. J. Bk. 97; 29 L. T. 72; 21 W. R. 865.)

Where a verdict for breach of contract is obtained against the bankrupt before the commencement of the bankruptcy, but judgment is not signed or costs taxed until afterwards, the whole claim is barred, as it is provable. (*Ex parte Peacock*, L. R. 8 Ch. 682; 42 L. J. Bk. 78; 28 L. T. 830; 21 W. R. 755.)

When a composition is a defence.

Defence of composition, &c., under Bankruptcy Act, 1869.—A resolution for a composition duly passed under s. 126 of the Bankruptcy Act, 1869, is a bar to any creditor bound thereby, so long as there has been no default on the part of the debtor to perform his part of the agreement. (*Slater v. Jones*, and *Capes v. Ball*, L. R. 8 Ex. 186; 42 L. J. Ex. 122; 29 L. T. 56; 21 W. R. 815.) But upon such default or upon his failing to pay an instalment of the composition, the creditor may sue for the whole balance of the debt remaining due, whether or not he has assented to the resolution. (*Edwards v. Coombe*, L. R. 7 C. P. 519; 41 L. J. C. P. 202; 27 L. T. 315; 21 W. R. 107; *Goldney v. Lording*, L. R. 8 Q. B. 182; 42 L. J. Q. B. 103; 21 W. R. 543.)

On an action to recover a debt of £50, the defendant pleaded that as to £27 16s. 10d. it was the balance remaining due on a joint and several promissory note, made by the defendant and H. carrying on business as co-partners to secure a debt due from them to the plaintiffs, that defendant and H. instituted proceedings under ss. 126, 127 of the Bankruptcy Act, 1869, and that an extraordinary resolution of the creditors was passed for accepting a composition payable by instalments, to be secured by joint and several notes. Held, Kelly, C. B., *dissentiente*, that assuming the plaintiffs were not parties to the resolution, and had not adopted it or received any instalment under it, the facts alleged offered no defence to the action. (*Simpson v. Henning*, 44 L. J. Q. B. 143; L. R. 10 Q. B. 406; 33 L. T. 508, Ex. Ch.) A creditor who has attended the meetings under sect. 126 of the Bankruptcy Act, 1869, and who has voted for the resolutions, is bound thereby, though his debt is omitted from the debtor's statement. (*Campbell v. Im Thurn*, 45 L. J. C. P. 482; 1 C. P. D. 267; 35 L. T. 265; 24 W. R. 675.) *Secus*, if he does not adopt the composition. (*Macdonald v. Chesney*, 50 L. J. Q. B. 87.)

In order that a resolution to accept a composition should be a bar to an action against the debtor, the statement must show a definite amount admitted to be due; and therefore where after the amount of the creditor's (the plaintiff's) claim, it was stated to be disputed under legal advice, and referred to arbitration, this debt was held not to be barred. (*Melhado v. Watson*, 46 L. J. C. P. 502; 2 C. P. D. 281; 36 L. T. 724; 25 W. R. 562, on Appeal, reversing the decision of the Court below; *Burliner v. Royle*, 5 C. P. Div. 354.)

These stringent rules do not apply to compositions under the Act of

quarters of best red wheat at 50s. per quarter, to be delivered on the wharf at Liverpool in the month of March, 1883.

2. The defendant did not deliver 500 quarters of the said wheat.

3. 100 quarters delivered were not merchantable, and 180 quarters delivered were white wheat.

4. In the month of May, 1883, the said A. B. was adjudicated bankrupt, and the plaintiff was appointed the trustee of his estate.

Particulars of damage :

Loss of profit, at 2s. per quarter, on			
1000 quarters	£100	0	0
100 quarters, at 40s. . . .	200	0	0
180 quarters, at 3s. . . .	27	0	0
	£327	0	0

The plaintiff claims £327.

1883, for by s. 18, sub-s. 8, a composition or scheme adopted and approved in pursuance of the section shall be binding on all the creditors so far as relates to any debts due to them from the debtor, and *provable* in bankruptcy, and (sub-s. 9) the certificate of the official receiver that a composition or scheme has been duly accepted and approved is made, in the absence of fraud, conclusive as to its validity. (Cf. s. 19.)

Where a debt was contingent and was omitted from the debtor's statement, it was held not to be barred by a resolution to accept a composition. (*Wilson v. Breslaue*, 46 L. J. C. P. 593; 2 C. P. D. 314; 37 L. T. 24; 25 W. R. 818; 3 App. Cas. 672; 47 L. J. C. P. 729; 39 L. T. 67; 26 W. R. 536.)

The release of a debtor by resolution for composition does not release his co-debtor. (*Ex parte Jacobs*, L. R. 10 Ch. 211; 44 L. J. Bk. 34; 31 L. T. 345; 23 W. R. 251.)

In liquidation by arrangement under s. 125 of the Bankruptcy Act, 1869, a creditor is, in the absence of fraud, bound by the resolutions passed, if duly registered under s. 127, though he has no notice of the proceedings, and though his name and debt be omitted from the list of creditors; and no subsequent promise to pay will support an action founded on a debt from which the debtor is released by virtue of the Bankruptcy Act, 1869. (See *Heather v. Webb*, 46 L. J. C. P. 89; 2 C. P. D. 1; 25 W. R. 253.)

By sect. 15 of 32 & 33 Vict. c. 62 (Debtors Act, 1869), where a debtor makes any arrangement or composition with his creditors under the provisions of the Bankruptcy Act, 1869, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends. (See *Ex parte Halford*, L. R. 19 Eq. 436; 44 L. J. Bk. 73; 32 L. T. 103; 23 W. R. 442.)

Where a composition a defence.

A bankrupt after his discharge remains liable for debts incurred by fraud.

Defence.

The defendant says :

1. He did not contract to sell or deliver 1000 quarters of wheat, or any other quantity of wheat, to A. B.

2. Alternatively if he did, on March 21, 1883, he duly tendered 1000 quarters of best 'red wheat to A. B., and A. B. refused to pay for it.

3. The contract was rescinded before breach. Particulars are as follows: An arrangement between A. B. and the defendant, by letter from the defendant to A. B., dated the 22nd of March, 1883, and a letter in answer from A. B. to the defendant, dated the 23rd of March, 1883.]

4. By an order of the London Bankruptcy Court of the 29th of June, 1883, the bankruptcy of A. B. was annulled, and a scheme of arrangement of the affairs of A. B., under section 28 of the Bankruptcy Act, 1869, approved, whereby all rights of action vested in the plaintiff as the trustee of the estate of A. B. were revested in A. B.

Action by Trustee under a Scotch Sequestration Registered in London Bankruptcy Court for Debt due to Sequestered Estate.

1. The plaintiff is trustee of the sequestered estate of Messrs. W. & Co., and of the several estates of the partners of the said firm, by virtue of a warrant made in the Scotch Sequestration on — 1875, and duly registered in the London Bankruptcy Court.

2. On the — day of —, 1882, and the —, 1883, in consideration that the plaintiff would compromise a claim, which as such trustee he was making on the defendant, the defendant offered the plaintiff, in writing, to agree to admit a liability of, and to pay £500 to the plaintiff, and the plaintiff accepted these terms.

The plaintiff claims £500, and interest thereon, from the — of — 1882, until payment or judgment.

Defence.

That the Defendant's Creditors accepted a Composition, which has been paid.

The defendant says :

1. On the 24th of May, 1883, the defendant compounded with his creditors, under the 126th section of the Bankruptcy Act, 1869.

2. The defendant has duly paid the amount of the said composition to the plaintiff [or to H. B., by the composition resolutions appointed to receive and distribute the said composition].

3. The plaintiff's name and address, and the amount of his debt, were duly stated in the defendant's statement of affairs.

Reply.

The plaintiff says that :

(1) He denies that the defendant paid the amount of the composition to him [or to the trustee H. B.], although the time appointed by the composition resolutions elapsed before the commencement of this action.

(2) As to the 3rd paragraph he joins issue.

Defence.

That the Defendant's Affairs were liquidated by Arrangement.

The defendant says :

1. The defendant was discharged under a liquidation by arrangement, pursuant to the 125th section of the Bankruptcy Act, 1869.

2. The debt was barred by the Statute of Limitations, 3 & 4 Will. IV. c. 27.

Bills of Exchange (a).

Drawer of a Bill of Exchange against Acceptor.

The plaintiff's claim is against the defendant as acceptor of a bill of exchange for £500, dated September 5, 1883, drawn by the plaintiff, payable three months after date.

Particulars :—

Principal due	.	.	.	.	.	£500	0	0
Interest	.	.	.	.	.	10	0	0
Amount due	.	.	.	.	.	£510	0	0

Actions on
bills.

(a) In actions upon bills of exchange, promissory notes, and cheques, the writ of summons may, at the option of the plaintiff, be specially endorsed under R. S. C. Order III. r. 6. The summary practice under the Bills of Exchange Act, 18 & 19 Vict. c. 67, is no longer in use. It is usual to endorse the writ specially, as the plaintiff is thereby enabled to apply for summary judgment under Order XIV. r. 1. Thereupon the defendant will not be allowed to defend the action unless he satisfy the judge at chambers that he has a good defence to the action. But the Court is disinclined to shut out the defendant's defence unless it is palpably bad, and, except between immediate parties, it is common practice to allow the defendant unconditional leave to defend when he says: "I was cheated out of the bill, and I suspect the plaintiff did not give value for the bill. Let me cross-examine him before a jury."

When
defence
allowed.

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer. The law regarding bills of exchange has been codified by the statute 45 & 46 Vict. c. 61, which see. A bill may be accepted (sect. 18): (1) before it has been signed by the drawer, or while otherwise incomplete; (2) when it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment; (3) when a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it. The holder, in the absence of any different agreement, is entitled to have bill accepted as of the date of first presentment to the drawee for acceptance. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer (s. 17). An acceptance is invalid unless it complies with the following conditions, namely: (a) It must be written on the bill, and be signed by the drawee. The mere signature of the drawee, without additional words, is sufficient. (b) It must not express that the drawee will perform his promise by any other means than the payment of money.

Conditional
acceptance.

An acceptance (sect. 19) may be partial, conditional, or local. But a holder is not bound as against previous parties to take a conditional acceptance (*Petit v. Benson*, Comb. 452); but if the acceptance was in fact conditional, it will not support the allegation of an absolute acceptance though the condition has been performed. (*Langston v. Conary*, 4 Campb. 176; *Swan v. Cox*, 1 Marsh. 176.) If, however, the drawee has accepted on condition of an extension of time for payment, the

*Payee of two Bills of Exchange against Acceptor upon the Bill,
and also the Consideration.*

1. On May 15, 1883, an account was stated and settled between the plaintiff and defendant, and it was thereby agreed

holder may sue as on a bill accepted payable at the postponed date. (*Russell v. Phillips*, 14 Q. B. 891.) There may be an acceptance of a bill before it is filled in, and an acceptance of a blank bill is an authority (sect. 20) to fill it up with any sum covered by the stamp (*Armfield v. Allport*, L. J. 27 Ex. 42; *Garrard v. Lewis*, 10 Q. B. Div. 30); and such acceptance binds the person signing to an innocent holder for value though the bill may have been issued improperly, or after a lapse of twelve years (*Montagu v. Perkins*, L. J. 22 C. P. 187), and in such a case the Statute of Limitations is no defence. (S. C.) A person who negligently issued a paper stamped with a bill stamp and signed by him, without intending it to be filled up as a bill, was held not liable to a subsequent *bonâ fide* holder for value. (*Baxendale v. Bennet*, 3 Q. B. Div. 525; 47 L. J. Q. B. 624; questioning *Young v. Grote*, 4 Bing. 253, *Ingham v. Primrose*, 28 L. J. C. P. 294.)

Effect of acceptance of blank bill.

A bill of exchange drawn generally may be accepted in either of the following ways, viz., either generally, or payable at a particular place, or at a particular place and not elsewhere. If the drawee accepts generally he undertakes to pay the bill at maturity when presented to him. If he accepts payable at a banker's, he undertakes to pay the bill at maturity when presented either to himself or at the banker's. If he accepts payable at a banker's and not elsewhere, he contracts to pay the bill at maturity provided it is presented at the banker's, but not otherwise. (*Halstead v. Skelton*, 5 Q. B. 86 & 93.) It follows from this that it is only when the acceptor has made the bill payable at a particular banker's and not elsewhere, that in an action against him it is necessary to aver in the statement of claim and prove at the trial a presentment for payment at the place named. (*Fayle v. Bird*, 6 B. & C. 531.)

Three forms of acceptance, and effect of each.

In the case of a general acceptance, or even an acceptance payable on demand at a particular banker's, in an action against the acceptor, it is not necessary to aver and prove a presentment for payment; and it has even been held that if the holder neglects to present, and the bankers at whose house the bill is made payable generally fail with money of the acceptor in their hands, the acceptor is not thereby discharged. (*Turner v. Hayden*, 4 B. & C. 1; *Norton v. Ellam*, 2 M. & W. 461.)

One partner in a trading partnership can bind his fellow partners by accepting a bill in the name of the firm; but the implied power of one partner to bind the others by his acceptance, or for the matter of that, by his indorsement of bills, does not extend to partnerships other than for trading purposes, such as a firm of solicitors. (*Hedley v. Bainbridge*, 3 Q. B. 316; *Forster v. Mackreth*, L. R. 2 Ex. 163.)

Acceptance by partners.

It has been held that where one partner accepts a bill intending to bind the partnership, it is necessary that he should have accepted in the name of the firm, so that the name of the firm appears on the face of the bill. An action cannot be maintained against the firm where one partner signs his own name only although the proceeds are in reality applied to partnership purposes (*Nicholson v. Ricketts*, L. J. 29 Q. B. 55), for no person whose name or the name of whose firm does not appear on the bill, can be made liable on it. (Sect. 23 of the Act of 1882.) (*Beckam v. Drake*, 9 M. & W. 79, 92, 96; *Miles' Claim*, L. R. 9 Ch. 635; 43 L. J. Ch. 732; 31 L. T. 9; 22 W. R. 809.) The firm will be liable on the bill

that the defendant was indebted to the plaintiff in the sum of £400 on the balance of accounts for goods consigned by the plaintiff to the defendant as the plaintiff's agent for sale.

2. On the same day the defendant agreed to pay interest on the said sum of £400, at the rate of £5 per cent. per annum, if three months' time for payment were given him.

3. On May 15, the defendant accepted a bill of exchange for £405 drawn by the plaintiff and payable to the plaintiff's order three months after date.

Particulars :—

Principal due	.	.	.	.	.	£405
Interest	.	.	.	.	.	20
						£425

The plaintiff claims £425, and interest on £405 at the rate of £5 per cent. per annum until payment or judgment.

Where partner accepts in his own name, firm not liable.

(that is, where it is accepted by a partner in their name apparently for partnership purposes), although the proceeds were not in fact applied to partnership purposes, and were never intended by the partner accepting the bill to be so applied, provided always the plaintiff was not a party to this fraud : but the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against him, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who takes the security to remove by showing either that the party from whom he received it acted with the authority of the rest of his partners, or that he himself had good reason to believe so. (*Leveson v. Lane*, 13 C. B. N. S. 278 : L. J. 32 C. P. 10 ; *Heilbut v. Neville*, L. R. 4 C. P. 354 ; affirm. in Ex. Ch. L. R. 5 C. P. 478 ; 39 L. J. C. P. 245 ; 22 L. T. 662 ; 18 W. R. 898 ; *Hogarth v. Latham*, 3 Q. B. Div. 643 ; 47 L. J. Q. B. 339 ; 39 L. T. 75 ; 26 W. R. 388.)

Directors of joint-stock, mining, and railway companies have no power to accept bills.

There is no implied authority in a director of a joint-stock company, not being a trading partnership, to accept bills on the part of the company (*Bramah v. Roberts*, 3 Bing. N. C. 963) ; nor is there any such authority in the directors of a mining company to bind the shareholders by making notes or accepting bills. (*Dickinson v. Valpy*, 10 B. & C. 128.) A railway company incorporated in the usual manner cannot draw, accept, or indorse bills (*Bateman v. Mid-Wales Railway Co.*, L. R. 1 C. P. 499) ; nor has a company incorporated under the Companies Act, 1862, this power, unless it is given by the memorandum and articles of association. (*Peruvian Railway Co. v. Thames and Mersey Marine Insurance Co.*, L. R. 2 Ch. 617.)

Acceptance by agents.

An agent accepting a bill must be careful to make the fact of his agency appear on the face of the bill, for the law is that an agent will be personally liable to third persons by drawing, indorsing, or accepting in his own name, unless he unequivocally show on the face of the writing that he signs only in a ministerial capacity. (See *Thomas v. Bishop*, 2 Str. 955 ; *Owen v. Van Oster*, 10 C. B. 318 ; *Marc v. Charles*, 25 L. J. Q. B. 119.) Where an agent acting within his authority accepts a bill

Indorsee against Acceptor and Drawer (b).

The plaintiff's claim is against the defendant A. B. as acceptor, and against the defendant C. D. as drawer of a bill of exchange for £1000 dated 1st of January, 1883, payable three months after date, and indorsed by the defendant C. D. to the plaintiff, of the dishonour of which on presentation the defendant C. D. had notice.

Particulars :—

Principal	£1000
Interest	40 (c)
Amount due	£1040

for his principal, the latter is of course bound ; but a person may be bound though he has not himself accepted, nor has his agent done so for him, for if the drawee accredit the bill by acknowledging the hand-writing of the acceptance to be his, before the plaintiff took it, he cannot afterwards exonerate himself by showing that the acceptance was forged. (*Leach v. Buchanan*, 4 Esp. 226 ; *Mackenzie v. British Linen Co.*, 6 App. Cas. 82.)

(b) The plaintiff's title to sue consists in this, that some holder of the bill has indorsed it to him, and then delivered to him the bill with intent to transfer the property. (45 & 46 Vict. c. 61, s. 31.) The intention to transfer the property in the bill is essential, for the defendant may, if he can, show that the bill was never delivered to the plaintiff as indorsee, but only as agent for another (*Adams v. Jones*, 12 Ad. & E. 455), or that it had been delivered to the plaintiff, on a condition which had not been complied with. (*Bell v. Ingestre*, 12 Q. B. 317.) In the form given above there is only one indorser and one indorsee, the plaintiff ; but it constantly happens in practice that on a bill there are several indorsers and several indorsees ; and this being so, the question frequently arises whether in the statement of claim it is necessary to set out the fact of all the indorsements one after another. Previously to the Judicature Acts the rule was that where the first indorsement was made *in blank*, the bill became payable to bearer, and the holder might then state an indorsement from the payee to himself directly, though there were intermediate special indorsements (*Walker v. Macdonald*, 2 Kxch. 527) ; and there is nothing in the new practice to alter the law on this point. Where, however, the first indorsement is not in blank, but is a special indorsement, it will be necessary to aver an indorsement by the first indorsee, and so on until either an indorsement in blank by some indorser is obtained, or an indorsement direct to the plaintiff ; otherwise there would be a flaw in the plaintiff's title to sue on the bill.

(c) In the absence of agreement, bills of exchange and promissory notes carry interest ; but there is an important distinction, as to the time from which the payment of interest runs, between the cases where a bill or note is expressly made payable with interest and the cases where the liability to pay arises by implication of law. The distinction is this, where the bill or note is expressly made payable with interest, it is payable from the date of the note, as in the above form (*Richards v. Richards*, 2 B. & Ad. 447) ; but where the instrument is silent as to

What necessary to constitute title by endorsement.

How endorsement pleaded where intermediate transfers.

Interest on bills.

Defence by Acceptor.

The defendant A. B. says :

1. He did not accept the bill.
2. If he accepted the bill, he did so and delivered it to the drawer without consideration for the purpose of the drawer (the defendant C. D.) getting it discounted for this defendant, and the drawer, in fraud of this defendant, and contrary to the said purpose, indorsed the bill without consideration.
3. The bill was indorsed to the plaintiff when overdue.
4. The bill was indorsed to the plaintiff with notice of the said fraud.

Defence by Drawer.

The defendant C. D. says :

1. He did not indorse the bill of exchange to the plaintiff.
2. The bill was not presented for payment.
3. This defendant had not due notice of dishonour.
4. The plaintiff was not the holder at the commencement of the action.

Indorsee against Acceptor on a Bill accepted payable at a particular Place and not elsewhere.

On May 31, 1883, the defendants accepted 'a bill of exchange for £500 drawn by A. and payable three months after date to A. or his order at Messrs. J. & Co.'s banking house, L. Street, London, and not otherwise or elsewhere ; and

interest, it is payable only from the time when the instrument became due. Upon a bill or note payable on demand generally, not specifying interest, interest is given from the time of demand proved (*Blaney v. Hendricks*, 2 W. Bl. 760 ; *In re East of England Banking Co.*, L. R. 6 Eq. 368 ; affirmed, L. R. 4 Ch. 14) ; and where no demand is proved, from the issuing of the writ. (*Pierce v. Fothergill*, 2 Bing. N. O. 167.) The indorsee of a bill may sue the acceptor for interest although he has taken another bill from the defendant for the amount of the first, which has been duly paid. (*Lumley v. Musgrave*, 4 N. C. 9.)

Rate of
interest
chargeable.

The rate of interest allowed on inland bills is £5 per cent., unless another rate is mentioned in the bill or note. (*Keene v. Keene*, 27 L. J. C. P. 88.) On foreign bills interest is recoverable at the rate of interest at the place where the bill was drawn, accepted, or indorsed, as the case may be, according to the liability of the party sued. (*Allen v. Kemble*, 6 Moore, P. C. 314 ; *Gibbs v. Freemont*, 9 Ex. 25.)

the said bill of exchange has been indorsed to the plaintiff, but upon being duly presented it was dishonoured.

The following are particulars of the plaintiff's claim :—

Principal due	£500
Interest	6
Amount due	£506

Defence.

The defendant says :

1. A. did not indorse the bill.
2. The plaintiff is not the holder of the bill.
3. The bill was accepted for the accommodation of A., the drawer, and, if indorsed to the plaintiff at all, was indorsed to him without consideration.
4. The bill was never presented at Messrs. J. & Co.'s banking house, L. Street, London.

Indorsee against Drawer for Default of Acceptance (a).

1. The defendant, on the 1st of May, 1883, drew a bill of exchange upon C. F. of Y., for £1000, payable to the order of

Claim
against
drawer for
non-accept-
ance by
drawee.

(a) By s. 55 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), it is provided that the drawer of a bill by drawing it (a) engages that on due presentment it shall be accepted and paid according to its tenour, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour (e.g. notice) be duly taken, and (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

A presentment for acceptance is not necessary except in the case of bills payable at or after sight (Bayley on Bills, 6 ed. 215); as the drawee is not liable on the bill till he accepts it, it is always desirable as soon as possible to present the bill for acceptance that his name may be got on to it. The drawee may require that the bill should be left with him for twenty-four hours before determining whether he will refuse or accept (*Van Diemen's Land, Bank of, v. Victoria, Bank of*, L. R. 3 P. C. 526, 543); and even though the drawee may have put his name on to the bill, he may cancel or revoke his acceptance before he parts with the bill. (*Coe v. Troy*, 5 B. & Ald. 474.) If the drawee refuse to accept the bill according to its terms, an action on the bill lies against the drawer, or any indorser immediately, although the time of payment is not come. (*Milford v. Mayer*, 1 Doug. 55; *Whitehead v. Walker*, 9 M. & W. 506.) But to ground the action as against the drawer or any indorser, due notice of the refusal to accept must be given, and if notice is not given, the effect is that the parties liable on the bill are discharged. (Roscoe's Nisi Prius,

Present-
ment for
acceptance.

Messrs. H. F. Brothers, of B., one month after date, and it was by them indorsed to the plaintiff who duly presented the same to the said C. F. for acceptance; but he refused to accept the same, whereof the defendant had due notice.

The plaintiff claims £1000 and £27 for interest up to the commencement of this action, and interest at the rate of £4 per cent. until payment or judgment.

Indorsee against Drawer of Bill of Exchange (a).

1. The plaintiff's claim is against the defendant as drawer of a bill of exchange for £50, dated Sept. 7, 1883, drawn upon

13th ed. 366.) In the statement of claim the presentment of the bill for acceptance, and the notice of dishonour should be distinctly averred as essential to the cause of action; if they are excused on any ground the matter of excuse must be specially averred. (*Burgh v. Legge*, 5 M. & W. 418, 421.)

Present-
ment of
bill pay-
able a cer-
tain time
after sight.

As already stated, a bill payable at a certain time after sight or at sight, must be presented for acceptance. This is necessary in order to fix the time of payment, for the sight by which the time of payment is regulated, is that of the drawee when the bill is presented to him for acceptance. There is no rule requiring a bill to be presented for acceptance within so many days or weeks after it is issued, and it may very well happen that a bill may circulate for some time and obtain on its back the names of half a dozen indorsers before it is seen by the drawee, and before therefore it has been accepted. The only rule upon the subject is that the bill should be presented for acceptance within a reasonable time, but what a reasonable time is, depends upon the circumstances of each case, and is a mixed question of fact and law. (*Mellish v. Raudon*, 9 Bing. 416; *Mullick v. Radakissen*, 2 Moo. P. C. 46. See also *Chartered Mercantile Bank of India, &c., v. Dickson*, L. R. 8 P. C. 574.)

Acceptor
primarily
liable.

(a) The acceptor is the party primarily liable on a bill of exchange, by which is meant that the holder of the bill at the time it falls due must seek payment from him before he resorts to the drawer or any of the indorsers where there are indorsers. (45 & 46 Vict. c. 61. s. 47.) The drawer and indorsers are spoken of as being sureties for the payment of the bill, and as only liable on the default of their principal. It is necessary, therefore, to the plaintiff's cause of action, when he is suing on a bill against the drawer or the indorsers, that he should duly present the bill for payment when it falls due. As is well known, on bills of exchange and promissory notes days of grace are allowed; and in the case of inland bills or notes the time to present a bill for payment is on the third day after, and exclusive of the day of becoming due. (*Tassell v. Lewis*, 1 Ld. Raym. 743.) When the last day of grace falls on a Sunday or Christmas Day, or on a Good Friday, or on a Fast-day, it is to be presented on the day *next before* those respective days; but by the Bank Holidays Act, 1871 (34 & 35 Vict. c. 17), when the last day falls on a bank holiday, the presentment is to be on the *next following* day. Presentment must be made, although the acceptor has become bankrupt, and where he is dead, it must be made to his executors or administrators, or if there be none, at the house of the deceased. (*Chitty on Bills*, 9th edit. 339.) A bill payable at a banker's must be presented within banking hours (*Parker*

Present-
ment for
payment—
days of
grace.

and accepted by X. Y., payable to the order of the defendant three months after date, and indorsed to the plaintiff.

2. The bill was duly presented for payment and dishonoured, whereof the defendant had notice.

Particulars :—

Principal due	£50 0 0
Interest	1 5 0
Amount due	£51 5 0

Defence.

The defendant says :

1. The bill was drawn for the accommodation of W. G. The defendant received no consideration for drawing it.

2. The defendant paid the amount due on the bill to the holder, one L. V., at maturity.

3. L. V. negotiated the bill when overdue in fraud of the defendant.

4. The defendant received no notice of dishonour.

v. Gordon, 7 East, 385); but presentment to a banker's clerk at the clearing-house is sufficient (*Reynolds v. Chettle*, 2 Camp. 596); and presentment at eight in the evening at the private residence of a merchant is good. (*Barclay v. Bailey*, 2 Camp. 527.) It has been already stated (*ante*, 169) that where a bill has been accepted payable at a particular place, in order to charge the *acceptor*, it is not necessary to present the bill for payment at that place unless it was made payable there *and not elsewhere*; but in order to charge the drawer or any indorser, it is otherwise, for where a bill is drawn or accepted payable at a particular place, the drawer or indorser can only be rendered liable upon presentment and dishonour at that place. (*Gibb v. Mather*, 8 Bing. 214; *Saul v. Jones*, 28 L. J. Q. B. 37.) In an action against the drawer or indorser not only must the plaintiff aver due presentment for payment and dishonour, he must also aver that the defendant had due notice of the same. As to what constitutes a good notice of dishonour, see *post*.

Where presentment to be made.

By s. 46 of the statute 45 & 46 Vict. c. 61, it is provided :—

(1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

(2) Presentment for payment is dispensed with :

(a) Where after the exercise of reasonable diligence presentment as required by this Act cannot be effected. The fact that the holder has reason to believe that the bill will on presentment be dishonoured, does not dispense with necessity for presentment.

Reply in an Action by Indorser against Drawer excusing Want of Notice of Dishonour which has been set up by the Defendant (a).

1. A. B. had no effects of the defendant, nor was there any consideration for the payment of the said bill by the said A. B.

(b) Where the drawee is a fictitious person.

(c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(e) By waiver of presentment express or implied.

What excuses from notice of dishonour.

(a) Notice of dishonour to the drawer is unnecessary, if he had not at the time of drawing, or before the time of the bill becoming due, any effects either in the hands of the drawee or consignee, or on their way to him (*Bickerdike v. Bolman*, 2 Smith, L. C., 7th ed. 50); nor a reasonable expectation of having any. (*Taridge v. Dalton*, L. M. & S. 226.) The Courts, however, are disinclined to dispense with notice of dishonour, and evidence that the drawer had any effects in the hand of the acceptor, though he owes him for more than the value of those effects (*Blackham v. Doren*, 2 Camp. 503) will necessitate an averment and proof of notice of dishonour; and in general where the drawer would have any remedy over against a third person (as in the case of a bill drawn for the accommodation of a person to whom he indorses it), notice must be alleged. (*Cory v. Scott*, 3 B. & Ald. 619; *Laffitte v. Slatter*, 6 Bing. 623.) "The rule is that when a person is entitled to notice of dishonour no excuse is sufficient to obviate the necessity of such notice, unless the defendant can have no remedy over." (Brett, L. J., in *Turner v. Samson*, 46 L. J. Q. B., C. P. & Ex. D. 167; 2 Q. B. D. 23; 35 L. T. 537; 25 W. R. 240.) The doctrine already stated, as applied to the case of a drawer, will not be extended to an indorser, unless the facts make it quite clear to an absolute certainty that such indorser could not have been damaged by want of notice. (*Foster v. Parker*, 46 L. J. Q. B., C. P. & Ex. D. 77; 2 C. P. D. 18; 25 W. R. 321.) Whenever the want of notice is excused, the circumstances relied upon as the excuse must be stated in the statement of claim (*Burgh v. Legge*, 5 M. & W. 418); but a mere delay in giving notice of dishonour, unavoidable or reasonable, in the circumstances of the particular case, need not be specially excused, but may be averred as due notice of dishonour. (*Firth v. Thrush*, 8 B. & C. 387; *Lundie v. Robertson*, 7 East, 231.) The effect of a promise to pay a dishonoured bill has been stated thus by Byles, J.: "A promise to pay may operate either as evidence of notice of dishonour, or as a prior dispensation, or as a subsequent waiver of notice. Whether made after, or even before, the time for giving notice has expired, a promise to pay is always evidence from which a jury may infer due notice. But even where the evidence is conclusive to show that due notice was not given, or where the jury refuses to draw the inference that it was given, yet a promise to pay made within the time for giving notice is a dispensing with notice, and made after that time is a waiver of notice." (*Cordery v. Colville*, L. J. 32 C. P. 210.) Where a promise to pay is relied on as excusing notice of dishonour, it ought to be expressly alleged in the statement of claim either as a dispensing with notice or a waiver of

Circumstances excusing non-notice to be stated in pleading.

*Drawer, where Bill is made payable to his Order, against
Acceptor.*

[The plaintiff has proceeded here against the defendant by means of a specially indorsed writ under Order III. r. 6, and on the writ the bill of exchange is set out. The writ is then deemed to be the statement of claim, and no further statement of claim is to be delivered. Order XX. r. 11.]

Defence.

The defendant says that :

1. He had no consideration for accepting the bill.
2. He accepted it for the price of goods sold and to be delivered to him forthwith by the plaintiff.
3. The plaintiff has not delivered to the defendant the said goods or any part thereof.

*Holder of a Bill against the Acceptor, Drawer, and Indorsers in
Default of Payment.*

1. The defendant A. B., on June 20th, 1883, drew a bill of exchange for £500, payable to the order of the defendant E. F.

notice. See also on this subject *Rabey v. Gilbert*, 30 L. J. Ex. 170, 172; and *Turner v. Samson*, 2 Q. B. D. 23; 46 L. J. Q. B. 167; 35 L. T. 537; 25 W. R. 240. Now, by the codified law, 45 & 46 Vict. c. 61, s. 50—

(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate notice must be given with reasonable diligence.

(2) Notice of dishonour is dispensed with (a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to, or does not reach the drawer or indorser sought to be charged: (b) By waiver, express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice: (c) As regards the drawer in the following cases, namely: (1) Where drawer and drawee are the same person: (2) Where the drawee is a fictitious person, or a person not having capacity to contract: (3) Where the drawer is the person to whom the bill is presented for payment: (4) Where the drawer or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill: (5) Where the drawer has countermanded payment. (d) As regards the indorser in the following cases, namely: (1) Where the drawee is a fictitious person, or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill: (2) Where the indorser is the person to whom the

When notice of dishonour is dispensed with.

one month after date, and the defendant C. D. accepted the same.

2. The defendant E. F. indorsed the said bill to the defendant G. H., by whom it was indorsed to one M. N., who indorsed it to the plaintiff.

3. At maturity the bill was duly presented for payment to the defendant C. D., and by him dishonoured, whereof due notice was given to the defendants A. B., E. F., and G. H.

The plaintiff claims the sum of £500, with interest at the rate of 5 per cent. from the 24th of July, 1877, until judgment or payment (a).

Acceptors of an Accommodation Bill against the Drawer on the Implied Indemnity (b).

1. The plaintiffs' claim is for £505 money paid by the plaintiffs as the acceptors of a bill of exchange for £500, dated May 17th, 1883, drawn by the defendant, payable three months after date and accepted by the plaintiffs for the accommodation of the defendant and without consideration.

2. The plaintiffs were compelled to honour the bill at maturity.

Particulars :—

Principal paid	.	.	.	.	£500	0	0
Interest paid	.	.	.	.	5	0	0
Amount due	.	.	.	.	£505	0	0

bill is presented for payment: (3) Where the bill was accepted or made for his accommodation.

(a) By R. S. C. Order XVI. r. 6, "the plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes."

(b) Where a person accepts a bill without consideration, for the accommodation of another, there is an implied undertaking by that other that he will hold him harmless on the bill, and that if the acceptor be compelled to pay, as he can be by any third party, he will indemnify him.

Foreign Bills of Exchange (a).*Indorsee against Acceptor for Default in Payment.*

1. On March 20th, 1876, at Venice, H. B., by his foreign bill of exchange directed to the defendant, required the defendant to pay that his first of exchange (second not paid) to the order of himself, for £500 one month after date, and the defendant duly accepted the same.

2. The said H. B. indorsed the said bill to the plaintiffs. The plaintiffs claim £500 and £—— for interest.

Defence.

The defendant says :

1. He accepted the bill for the accommodation of H. B. and received no consideration for his acceptance.
2. H. B. received no consideration for indorsing the bill.
3. The debt was barred by the Statute of Limitations, 21 Jac. 1, c. 16.
4. The bill was rendered void after issue by a material

(a) Foreign bills, as distinguished from inland bills, are such as are drawn or payable or both abroad. A bill of exchange is, *prima facie*, an inland bill, and therefore in the case of an action brought on a foreign bill, the statement of claim ought to state that it is a foreign bill. (Byles on Bills, 12th ed. 395.) Foreign bills are often drawn in parts, all the parts together making what is called a set. "Examples or parts of the bill are made on separate pieces of paper, each part being numbered and referring to the other parts. Each part contains a condition that it shall continue payable only so long as the others remain unpaid. These parts should circulate together; or one may be forwarded for acceptance while the other is delivered to the indorsee, thus relieving him from the necessity of forwarding his part for acceptance, but giving him the indorsee's security immediately, and diminishing the chances of losing the bill. Every transferor is bound to hand over to his transferee all the parts of the bill in his possession." (Byles on Bills, 12th ed. 390.) The whole set, of however many parts composed, constitutes but one bill, and the regular payment and cancellation of any one of the parts extinguishes all. But as between *bona fide* holders for value of different parts of the same bill, he who first obtains a title to his part is entitled to the other parts. (*Holdsworth v. Hunter*, 10 B. & C. 449.) The drawee should accept only one part, for if two accepted parts should come into the hands of different holders, and the acceptor should pay one, he might be obliged to pay the other parts also. (*Ib.*) For the law regulating the indorsement, acceptance, and payment of foreign bills, see Byles on Bills, 12th ed. 397—405. As to what expenses consequent on the dishonour of a foreign bill, may be recovered, see *Re General South American Company*, 7 Ch. Div. 637; 47 L. J. Ch. 67; 37 L. T. 599; 26 W. R. 232.

A bill of
Exchange
prima
facie
inland.

How
foreign
bills are
drawn.

cancelled, and the alteration of the date from the 15th of March to the 20th of March.

Reply.

The plaintiff says:

1. As to the 1st, 2nd, and 4th paragraphs of the defence he protests.

2. As to the 3rd paragraph of the defence, the plaintiff was an infant when the cause of action herein occurred, and he commenced this action within six years after he attained the age of twenty-one years.

By Indorsee against Indorser for Default in Payment.

1. On the ——— day of ———, 1882, at Berlin, Messrs. C. P., by their foreign bill of exchange directed to M. O., required the said M. O. to pay that their first of exchange (second and third not paid) to the order of themselves for £100 two months after date, and the said M. O. duly accepted the said bill.

2. Messrs. C. P. indorsed the same to the defendant, and the defendant indorsed the said bill to the plaintiff.

3. At maturity the said bill was duly presented for payment, and was dishonoured, whereupon the said bill was duly protested for non-payment thereof, and due notice of the dishonour and of the protest for non-payment was given to the defendant.

The plaintiff asks for £.

And for costs.

The defendant says:

1. The defendant has refused to indorse the bill by the said C. P. because the contents of the fraud are as follows: The plaintiff, on or about the 15th of May, 1882, falsely and fraudulently secured the defendant that he had shipped twenty tons of goods to the defendant's order the S.S. "Ajax," which he had never done.

*Promissory Notes (a).**Payee against Maker.*

The plaintiff's claim is against the defendant as maker of a promissory note for £250, dated 1st January, 1883, payable four months after date to the plaintiff.

Particulars :—

Principal	.	.	.	.	.	£250	0	0
Interest	.	.	.	.	.	10	0	0
Amount due	.	.	.	.	.	£260	0	0

Payee against Maker of a Note payable by Instalments, where one only of the Instalments is due (b).

1. The defendant, by his promissory note dated the 1st of January, 1883, promised to pay to the plaintiff the sum of

(a) At common law a promissory note was not a negotiable instrument but only evidence of a debt; but by the statute 3 & 4 Anne, c. 9, promissory notes were made negotiable. By 7 Geo. 4, c. 6, s. 3, promissory notes for less than £5 payable to bearer on demand are prohibited. It has been made a question whether a note payable to the maker's order is a promissory note within the statute of Anne, and negotiable. (*Flight v. Maclean*, 16 M. & W. 51; *Wood v. Mytton*, 10 Q. B. 805.) It is, however, agreed that when such note is indorsed, it then becomes a note payable to bearer or to the indorsee, or his order, according as the indorsement is in blank or to a named person. (*Hooper v. Williams*, 2 Exch. 13; *Abraham v. Marks*, 11 Q. B. 19.) But a note payable to an uncertain payee is not a promissory note. (*Cowie v. Stirling*, 25 L. J. Q. B. 335.) For other decisions as to what will or will not constitute a promissory note, see *Watson v. Evans*, 32 L. J. Ex. 137; *Holmes v. Jacques*, L. R. 1 Q. B. 376; *Miller v. Biddle*, 14 W. R. 110; and 45 & 46 Vict. c. 61, ss. 83, 89, and 3 to 9.

Quare, is note payable to maker's order negotiable?

In an action against the maker of the note where the promise to pay is general, no presentment to the maker need be proved (*Eron v. Russell*, 6 M. & S. 505); but where the note contains in the body of it (and not merely in a memorandum at the foot) a promise to pay at a particular place, a presentment at such place must be averred in the statement of claim (*Sanderson v. Bouces*, 14 East, 500; *Spindler v. Grellett*, 1 Ex. 384); and presentment at the place specified must be proved, though the maker may not be there to pay, and may have absconded and left no effect or means of payment there. (*Sands v. Clarke*, 8 C. B. 751; s. 87 of the Act 45 & 46 Vict. c. 61.) In an action on a note payable on demand, a demand need not be proved, for the action itself is a demand. (*Rumball v. Ball*, 10 Mod. 38.) By 45 & 46 Vict. c. 61, s. 88, the maker of a note by making it (1) engages that he will pay it according to its tenour, and (2) is precluded from denying to a holder in due course the existence of the payee, and his then capacity to indorse.

(b) A note of this kind, one made payable by instalments, is within the statute of Anne and negotiable. (See *Oridge v. Sherborne*, 11 M. & W. 374; *Carlon v. Kencaley*, 12 M. & W. 139.)

No presentment need be averred as against maker unless payable at a particular place. Payable on demand, no demand need be averred.

£200, in manner following, namely, £100 on the 1st of February, 1883, £50 on the 1st of March, 1883, and £50 on the 1st of April, 1883.

2. On the 4th of February, 1883, the first instalment fell due, but the defendant has not paid the same.

The plaintiff claims £100 and interest thereon from the 4th of February, 1883, until payment or judgment.

Defence and Counter-claim.

Defence.

The defendant says that :

1. He made the note in part payment of an illegal wager upon the result of the St. Leger horse-race, which he (the defendant) had lost,

2. He received no consideration for the note.

Counter-claim.

The defendant says that :

1. On the 1st of January, 1883, the defendant accepted a bill of exchange for £200, payable one month after date, and drawn by the plaintiff.

2. The defendant received no consideration for accepting the said bill, but accepted it for the accommodation of the plaintiff.

3. The defendant was compelled to pay the amount of the said bill at maturity.

Particulars :—

Principal	£200	0	0
Interest	10	0	0
Amount due	£210	0	0

The defendant claims £210 and interest on £200 until payment or judgment.

Reply.

The plaintiff, as to the defence says, that he joins issue.

The plaintiff, as to the counter-claim, says that :

1. He did not draw the bill.

2. The defendant did not accept it.
3. The defendant has not paid it.

Action by Payee against Maker.

The plaintiffs' claim is against the defendant, as maker of two promissory notes, dated the 1st of January, 1883, and the 1st of July, 1883, respectively, in the respective sums of £100 and £120, and each payable four months after date to the plaintiffs.

Particulars :—

Principal	£100	0	0
"	120	0	0
Interest	10	0	0
Amount due	<u>£230</u>	<u>0</u>	<u>0</u>

Defence that the Plaintiffs are suing for an Illegal Society (a).

The defendant says that :

1. The notes were made by the defendant in payment of a claim upon him by the C. T. Building Society.
2. The plaintiffs took the notes and sue as trustees for the said society, and not otherwise.
3. The said society consists and always has consisted of more than 20 persons.
4. Its object is and always has been the acquisition of gain by its members, by the carrying on of the business of land buyers and sellers and money-lenders.
5. The said society has never been registered as a company or otherwise under any statute.

(a) An association of more than twenty persons, established, and having for its object the acquisition of gain by carrying on a business, is an illegal society unless registered under the Companies Acts, and cannot sue upon contracts made with it. (See *Jennings v. Hammond*; *In re Padstow Total Loss and Collision Assurance Co.*, 20 Ch. Div. 137; and *Shaw v. Benson*, 11 Q. B. Div. 563.)

Indorsee against Maker and Indorser for Default of Payment.

1. The plaintiff's claim is against the defendant A. B. as maker, and the defendant C. D. as indorser, of a promissory note for £250, dated 1st January, 1883, payable four months after date and indorsed to the plaintiff.

Particulars :—

Principal	£250	0	0
Interest	10	0	0
Amount due	£260	0	0

Defence of A. B.

The defendant says that :

1. He did not make the note.
2. If he did, the plaintiff was not the holder at the commencement of the action.
3. The note was rendered void after issue by a material alteration, namely, by the alteration of the date from the 1st of January, 1883, to the 1st of December, 1882.

Defence of C. D. (a).

The defendant says that :

1. He did not indorse the note.
2. The note was not presented for payment.
3. The defendant C. D. had not due notice of dishonour.
4. The note was rendered void after issue by a material alteration, viz., by the alteration of the date from the 1st of January, 1883, to the 1st of December, 1882.

(a) In an action on the note against an indorser, the plaintiff must prove—1st, the making of the note; 2nd, the indorsement of the defendant; 3rd, the presentment for payment at the place specified, if any is specified; 4th, the default in payment; and 5th, due notice of dishonour.

Banker's Cheques (a).*Payee of Cheque against Drawer for Non-payment of Cheque.*

1. The plaintiff's claim is, as the holder for value, against the defendant, as drawer of a cheque for £250, dated 1st

(a) Cheques on bankers resemble bills and notes thus far, that they are negotiable, so as to entitle the holder to sue the drawer or indorser; but no acceptance is necessary, nor are there days of grace, and the drawer is the principal debtor, as the maker of a note, and not a surety for the acceptor, as in the case of bills. The holder of the cheque cannot compel the bankers on whom the cheque is drawn to pay it to him, because in the absence of any express undertaking on their part, there is no privity of contract between the parties; but if the bankers refuse to pay, the holder's remedy is against the drawer of the cheque, and the indorsers, if there are any such. If the bankers have improperly refused to honour the drawer's cheque, they having assets of his in hand, they are liable in an action to him. (See *ante*, p. 153.)

Difference between cheques and bills.

Holder cannot compel the bankers to pay a cheque.

Now by the statute 45 & 46 Vict. c. 61, s. 74—

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment, as between him and the banker, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

The practical result is that as between holder and drawer, mere delay in presenting the cheque for payment short of six years, is no answer unless the defendant has been prejudiced by the delay; as by the failure of the bank after the drawing of the cheque. (*Robinson v. Hawksford*, 9 Q. B. 52; *Laws v. Rand*, L. J. 27 C. P. 76.) If, in consequence of such delay the cheque become valueless by the failure of the bank, the drawer is released from liability; and in order to avoid this risk, the bearer must present it either himself or through his banker on the day following the day of receipt. (*Alexander v. Birchfield*, 7 M. & Gr. 1061.) But if the holder of the cheque does not live in the same place with the drawer, he may send it to his banker or other agent by the post of the next day after he receives it. However, as between holder and indorser the plaintiff is bound to show greater diligence in endeavouring to obtain payment. (3 Kent, Com. 88, 104; *Moule v. Brown*, 4 N. C. 266.)

Effect of delay in presenting cheque.

The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) countermand of payment; (2) notice of the customer's death, 45 and 46 Vict. c. 61, s. 74.

The rule of law as to bills of exchange and promissory notes, that an indorsee taking them after maturity takes them upon the credit of, and can stand in no better position than his indorser, does not apply to cheques. (*London and County Banking Co. v. Groome*, 8 Q. B. Div. 288.)

Effect of delay in presenting the cheque. Duty of

The cheque having been presented and dishonoured, it is the holder's

January, 1882, and addressed to the L. & C. Banking Co., and payable to the plaintiff or his order.

2. The cheque was dishonoured on presentation, whereof the defendant had notice.

The plaintiff claims £250.

Indorsee of Cheque against Indorser.

1. The plaintiff's claim is, as indorsee for value, against the defendant as the indorser of a cheque for £300, dated the 30th of June, 1883, drawn by A. B. upon the L. & W. Bank.

2. The cheque was duly presented for payment and dishonoured. The defendant had due notice of dishonour.

The plaintiff claims £300.

Defence.

The defendant says :

1. The cheque was not duly presented for payment.

2. The plaintiff kept the cheque for an unreasonable time, namely, one month, before presenting it.

3. When the defendant indorsed the cheque to the plaintiff, and for a week afterwards, A. B. the drawer had at the bank on which the cheque was drawn more money to his credit than was required to meet the said cheque.

4. On the 9th of July, 1883, A. B. was adjudicated bankrupt.

5. The defendant did not receive due notice of the dishonour of the cheque.

Defence.

Setting out Want of Consideration, Failure of Consideration, and Fraud to an Action on a Cheque.

The defendant says that :

1. The plaintiff was not the holder at the commencement of this action.

the holder upon dishonour of the cheque.

duty, if he intends suing either the drawer or the indorser on the dishonoured cheque, to give due notice of dishonour; and notice of dishonour is only dispensed with in the case of the *drawer* where the drawer had no effects in the hand of the banker, and had no reasonable expectation that the cheque would be paid. (See *Carew v. Duckworth*, L. R. 4 Ex. 313.)

2. The defendant drew the cheque without receiving any consideration, and for the accommodation of A. W. the payee.

3. The cheque was indorsed to the plaintiff without consideration, if indorsed to him at all.

4. The defendant was induced to draw the cheque by the fraud of the said A. W.

Particulars of the fraud are as follows :—

The said A. W., on or about the 15th of July, 1883, falsely and fraudulently stated to the defendant that he had deposited 50 pipes of port wine in the ——— warehouse, in the name and to await the orders of the defendant, which he had not done.

5. If the cheque was indorsed to the plaintiff, he had notice of the premises when it was so indorsed.

Bearer of a Crossed Cheque against Drawer (a).

1. The plaintiff's claim is as the holder for value against the defendant as the drawer of a cheque for £50, dated 1 July,

(a) The law on the subject of crossed cheques is now regulated by the statute 45 & 46 Vict. c. 61. By sect. 76 where a cheque bears across its face an addition of the words "And Company," or any abbreviation thereof, between two parallel transverse lines or of two parallel transverse lines simply, and either with or without the words "not negotiable," that addition shall be deemed a crossing, and the cheque is *crossed generally*; and where a cheque bears across its face an addition of the name of a banker either with or without the words "not negotiable," that addition shall be deemed a crossing, and the cheque shall be deemed to be *crossed specially*, and to that banker. Sect. 79 provides that where a cheque is *crossed generally*, the banker shall not pay it otherwise than to a banker; but where it is *crossed specially*, it must not be paid except to the banker to whom it is crossed or his agent for collection. By the same section "Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof." Lawful holders of uncrossed cheques are authorised to cross them, and holders of cheques crossed generally are authorised to cross them specially (sect. 77). The bankers on whom the cheque is drawn are liable to the true owner if they pay a crossed cheque except as directed by the Act, s. 79.

What amounts to a crossing of a cheque.

Crossing generally.

Crossing specially.

Bankers liable if they pay a crossed cheque except as directed by the Act.

GENERAL DEFENCES TO ACTIONS ON BILLS, NOTES, AND CHEQUES.

The loss of the bill, &c.—It is a good defence to an action on a bill or note or cheque in a negotiable state, that the same has been lost or cannot be produced by the plaintiff. The principle of this defence is that the holder of a negotiable security is only entitled to payment on

Defence on bill, &c.

Loss of bill.

1883, drawn upon the J. S. Bank, payable to C. D. or bearer, and crossed generally. The said cheque was duly presented

How the
defence is
defeated.

production of it for re-delivery to the person liable to pay. As however this defence often worked great injustice, it was provided by the C. L. P. Act, 1854, sect. 87, "in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court or judge or a Master against the claims of any other person upon such negotiable instrument." But unless he avail himself of this enactment, the plaintiff, where the defence is properly pleaded—by that is meant specially and distinctly raised—cannot recover on a lost bill indorsed by the payee *without proving that it has been destroyed*. (*Pierson v. Hutchinson*, 2 Camp. 211; *Hansard v. Robinson*, 7 B. & C. 90; *Comfians Stone Quarry Co. v. Parker*, L. R. 3 C. P. 1.) The plaintiff should offer an indemnity before action. (*King v. Zimmerman*, L. R. 6 C. P. 466.)

Alteration.

Alteration.—A material alteration in a bill, even though made by a stranger, avoids it, even in the hands of an innocent holder for value (*Master v. Miller*, 2 H. Bl. 140), except as against parties consenting to such alteration. (*Downes v. Richardson*, 5 B. & Ald. 674.) See further, *ante*, "Alteration," pp. 129—130, and *Suffell v. Bank of England*, 9 Q. B. D. 555.

Presump-
tion of
considera-
tion.

Want of consideration.—It is said that bills and notes are presumed to have been given for consideration; but this only means that the plaintiff in the first instance need not aver and prove that any consideration passed. If, however, the fact of there being consideration is denied, or any suspicion is thrown upon the bill, then the plaintiff may have to show that there was consideration in fact. Want of consideration alone is only a defence when the parties to the action are the parties as between whom there was the alleged want of consideration, or as between parties who are in privity with them. See 45 & 46 Vict. c. 61, ss. 29 and 30. It is also good defence between remote parties where the bill has passed without consideration through the hands of the intermediate parties. In this latter case care must be taken in pleading the defence to aver want of consideration at each step, that is, at each indorsement or transfer of the bill or note. (*Whitaker v. Edmonds*, 1 A. & E. 638; *Hunter v. Wilson*, 4 Ex. 489; *Low v. Chifney*, 1 Bing. N. C. 267.) A *bond fide* holder for value is not affected by any want of consideration as between antecedent parties to the bill or note. On the subject of consideration the recent case of *Currie v. Misa*, 1 App. Cas. 554, 45 L. J. (H. L.) 852, is of importance. There it was decided that a creditor to whom a cheque or other negotiable security is given on account of a pre-existing debt, holds it by an indefeasible title, whether it be a cheque or bill payable at a future time or on demand.

When want
of con-
sideration
a defence.

When not
a defence.

When ille-
gality of
considera-
tion a
defence.

Illegality of consideration.—This is a good defence as against the parties guilty of the illegality or those privy to it, and also as against all those to whom they have passed the bill without value; but as against a *bond fide* indorsee for value without notice of the illegality, it is no defence. (*Wyat v. Bulmer*, 2 Esp. 588; *Masters v. Ibberson*, 8 C. B. 100, 45 & 46 Vict. c. 61, s. 30.) In this and similar cases the question for the jury is now settled to be whether the party taking the bill acted with good faith. If he took it without actual knowledge of the illegality or other circumstance affecting the title to the note and gave full value for it, this entitles him to recover, although he may have neglected the means of ascertaining the illegality which were in his power. (*Raphael v. Bank of England*, 17 C. B. 161, L. J. 25 C. P. 33; *Bengal Bank of v. Melce* 7 Moo. P. C. 35.)

through bankers and dishonoured, of which the defendant had due notice.

The plaintiff claims £50.

Agreement at variance with the bill.—The terms of a bill or note cannot be varied by *parol* evidence which contradicts it (*Stoll v. Fairland*, 52 L. J. Q. B. 420), even as between original or immediate parties to it, yet a contemporaneous memorandum in *writing* is admissible for that purpose, whether on the same or a separate paper. (*Leeds v. Lancashire*, 2 Camp. 206; *Bowerbank v. Monteiro*, 4 Taun. 844.) In such a case the bill or note and the memorandum will be looked upon as one instrument, and if the terms of the instrument so created do not entitle the plaintiff to recover against the defendant at the time and in the manner in which he is seeking to recover, the defendant has a good defence. (*Young v. Austen*, L. R. 4 C. P. 553.)

Variation of terms of the bill by another instrument.

Defences to bills.

No presentation for payment.—The drawer and indorsers of a bill and the indorser of a note may plead that the bill or note was not duly presented for payment, or that it was not presented at all, or where made payable at a particular place, not presented at such place. (45 & 46 Vict. c. 61, s. 45.) This will also be a good defence to the acceptor of a bill, or the maker of a note, when the bill or note was made payable at a particular place and not elsewhere, and there is an express stipulation. (45 & 46 Vict. c. 61, s. 52, and r. 87 as to notes.) As to what amounts to a good presentation for payment, see *ante*.

Non-presentation for payment.

No notice of dishonour.—The drawer and indorsers of a bill, and the indorsers of a note are, as a very general rule, entitled to due notice of the dishonour of the bill or note, where upon presentation it is dishonoured; and if such notice is not given to them they are discharged from all liability on the bill. There is no prescribed form of notice of dishonour, and it need not be in writing; but proof of *knowledge* of dishonour is not equivalent to proof of notice; and a mere demand of payment without notice of the dishonour is not sufficient. (*Hartley v. Luce*, 4 B. & C. 339.) The notice must convey to the mind of the receiver the following facts: 1. That the bill has been presented when due; and 2. That it has been dishonoured. (Sect. 49 of stat. 45 & 46 Vict. c. 61.) It was not necessary that the defendant should have had notice from the holder of the bill at the time it is dishonoured; it is enough if he has had notice from any person who is a party liable upon it. (*Chapman v. Keane*, 3 Ad. & E. 193; *Lysaght v. Bryant*, L. J. 19 C. P. 160; *Harrison v. Ruscor*, 15 M. & W. 231.) The holder of a bill who is desirous of suing all the parties to it, should give notice at once to all of them; otherwise notice may not be regularly transmitted to the prior parties, who may consequently be discharged. (*Rowe v. Tipper*, 13 C. B. 249; L. J. C. P. 135.) When notice is given by or on behalf of an indorser entitled to give notice, it secures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given. As to the time within which notice should be given, the general rule with regard to inland bills is, that where the parties do not reside in the same town, it is sufficient to send a notice by the post on the day following that on which the party sending receives intelligence of the dishonour. (S. 49 of 45 & 46 Vict. c. 61.) (*Williams v. Smith*, 2 B. & Ald. 496; *Geill v. Jeremy*, M. & M. 61.) It is a question of due diligence (sect. 50); and distance and other circumstances may sometimes warrant a longer delay, as where the holder of the bill does not know the address of the party to whom notice ought to be given. In the latter case where the holder is excused by ignorance from giving notice until after the usual day, the common allegation of due notice in the statement of claim is sufficient (*Firth v. Thrush*, 8 B. & C. 387); though generally an excuse for not giving notice

Who entitled to notice of dishonour.

The nature of the notice.

From whom notice should come.

The time within which it must be given.

What days are excluded from the computation of time.

Sufficient that notice of dishonour is posted.

should be specially pleaded. If the parties reside in the same town, notice must be given or sent off on the day after the dishonour of the bill, or the day after the sender has received notice of dishonour. (Sect. 49.) (Cf. *Smith v. Mullett*, 2 Camp. 208.) Where a party receives notice on a *dies non*, as Sunday, he is in the same situation as if he did not receive it till the next day. The 45 & 46 Vict. c. 61, ss. 49 & 92, provides for giving notice of dishonour, when a bill or note falls due on a non-business day, and excludes non-business days from the computation of time when the time limited for doing any act is less than three days. (Sect. 92.) Before the statute 45 & 46 Vict. c. 61, it was held that a Jew was not obliged to forward notice on the day of a great Jewish festival. (*Lindo v. Unsworth*, 2 Camp. 602.) But *quere* as to this now. It is sufficient proof of a notice to show that it was sent in a letter by the post, without proving that the letter was received. (*Saunderson v. Oridge*, 2 H. Bl. 509); and it is no answer that delay did in fact take place in the post-office. (*Woodcock v. Houldsworth*, 16 M. & W. 124.) When the notice must be given on a particular day, it is enough if the letter be put into the post at such an hour, that it would in the usual course be delivered on that day. (*Stoken v. Collin*, 7 M. & W. 515.) (45 & 46 Vict. c. 61, s. 49.) As to excusing notice, see p. 177, *ante*.

Payment.—See Roscoe's Nisi Prius, 12th ed. 390, for cases as to what amounts to a good payment of a bill or note.

Voluntary discharge.—As a general rule a principal debtor cannot be discharged *after breach*, except by a release under seal; but it has for a long time been held that an acceptor of a bill or a maker of a note can be discharged from liability by the express exoneration of the holder. (See *Dangwell v. Dunster*, 1 Doug. 247; *Farquhar v. Southey*, M. & M. 14; *Harner v. Steele*, 4 Exch. 1.) It is a question how far, if at all, this rule extends beyond the parties named—acceptors and makers; but the decision in *Foster v. Dawber*, 6 Exch. 839, L. J. 20 Ex. 385, is general; and the law of foreign countries from which this rule is probably borrowed, extends it to indorsers and parties to bills generally.

Giving time to principal debtor.—The acceptor of a bill of exchange is regarded as the principal debtor, and the drawer and indorsers merely as sureties; therefore any binding act by which the plaintiff agrees to give *extra* time for payment to the acceptor, will discharge the drawer and indorsers, and there is no difference between an accommodation acceptor and an acceptor for value. There must, however, be a binding agreement founded on a good consideration on which an action would lie if broken (*Moss v. Hall*, 5 Exch. 46); for mere forbearance to sue the acceptor is not equivalent to giving time. (*Price v. Kirkham*, 3 H. & C. 437; L. J. 34 Ex. 35.) Although there be a binding agreement to give time to the principal or to release him, yet if there is an express reservation of remedies against the surety, the surety is not discharged. (*Baterson v. Gooling*, L. R. 7 C. P. 9.)

Fraud.—If the consideration for a bill can be shown to be vitiated by fraud, of which the defendant was ignorant when he gave the bill, and if the defendant has derived no benefit from the contract, but has elected to repudiate it as soon as he knew of the fraud, he has a defence to an action on the bill *at the suit of the party to whom he gave it*. (*Mills v. Oddy*, 2 C. M. & R. 103.) As where by fraudulent representations a man induces another to give him for a business more than it is worth, and takes a bill in payment, he cannot recover on the bill. (*Archer v. Bamford*, 3 Stark. 175.) But where in the case supposed the bill is in the hands not of the person guilty of the fraud, but of an innocent indorsee or holder for value who is plaintiff, the defendant has no answer to the action. (*Robinson v. Reynolds*, 2 Q. B. 196.)

Notice of infirmity of title.—Though since the repeal of the usury laws the fact of taking a bill at a considerable undervalue is not, of

The effect of giving time for payment to the acceptor of a bill or maker of a note.

Between immediate parties fraud vitiates a bill.

Aliter in the hands of third parties.

Bill of Lading (a).

Action on a Bill of Lading for Injury done to Goods comprised in the Bill.

1. The plaintiff has suffered damage by breach of contract by bill of lading of cotton goods shipped by the plaintiff on

itself, sufficient to affect the title of the holder, it is an important element in considering whether the man who gave the undervalue was acting *bonâ fide* in ignorance and error, or was assisting in committing a fraud, and avoided making inquiries because they might be injurious to him. (*Jones v. Gordon*, 2 App. Cas. 616.)

(a) A bill of lading is a document which is signed and delivered by a shipowner, or the master of the ship as his agent, to the shipper in a general ship on goods being shipped. In practice, upon the goods being shipped, the mate usually gives the shipper an acknowledgment thereof, which is called the "mate's receipt," and the shipper, on taking this to the broker or captain of the ship, receives in exchange for it the bill of lading.

What a bill of lading is.

Bills of lading are generally made out in parts, one or more of which being sent to the consignee, one is retained by the shipper, and another given to the master, captain, or shipowner. The bill of lading, after mentioning the shipping of the goods in good order and condition, and their destination, contains an undertaking to deliver them in the like good order and condition (loss or damage by certain perils excepted) to the consignee or his assigns, the latter paying the agreed freight.

Bills of lading made in parts.

What it contains.

When goods are shipped under a bill of lading, drawn in parts, to be delivered to the consignee "or his assigns, the use of which bills being accomplished, the others to stand void," the master or the warehouseman who has custody of the goods, under the Merchant Shipping Act, 1862, is justified in delivering to the consignee on production of one part, although there has been a first indorsement for value to the holder of another part, provided the delivery be *bonâ fide* and without notice or knowledge of such prior indorsement. (*Glyn v. East and West India Dock Co.*, 7 App. Cas. 591.)

The delivery of a bill of lading duly indorsed passes the property to the indorsee, and since the 18 & 19 Vict. c. 111, the indorsee may sue on it in his own name. The actual holder of a bill of lading though insolvent, may defeat, by a *bonâ fide* indorsement and delivery, the right of the unpaid vendor or consignor to stop *in transitu*, even though the indorsee may know that the vendor or consignor was not paid, provided he did not know that the consignee was insolvent, or that the bills given by the latter in payment were bad. (*Cumming v. Brown*, 9 East, 506.) This doctrine would hold even where the only consideration for the assignment of the bill of lading is a past one, and has not been got by means of the bill of lading. (*Leask v. Scott*, 46 L. J. 576, reversing judgment below and dissenting from *Rodger v. The Comptoir d'Escompte de Paris*, 38 L. J. P. C. 30.)

How far indorsement confers a title to the goods.

But no property passes if there is fraud in the transfer, or if there be notice by the previous indorsement that the earlier transfer was only conditional. (*Virtue v. Jewell*, 4 Camp. 31.) Nor can a *bonâ fide* indorsee for value interfere with the consignor's right to stop *in transitu*, if the person through whom the bill of lading came to him had no authority from the shipper or consignee to put it in circulation, the bill of lading being, in this respect, like an overdue bill of exchange. (*Gurney v.*

No property passes where there is fraud.

board "the Jane," signed by defendant, dated the 1st of January, 1883.

2. 50 bales of cotton were delivered in a damaged condition.

Particulars of damage :—

50 bales at £2 £100 0 0

The plaintiff claims £100.

Shipper against Shipowner on a Bill of Lading for Damage and Short Delivery.

1. The plaintiff has suffered damage by breach of contract by bill of lading of goods shipped by the plaintiff signed by the master of the ship "Mary," as the defendant's agent, dated the 10th of September, 1883.

2. 50 quarters of wheat were delivered in a damaged condition, and 100 quarters were not delivered.

Behrend, 3 E. & B. 622.) The 18 & 19 Vict. c. 111, provides (sect. 2), that the extension which the Act gives to the rights and liabilities of indorsees shall not affect the right of stoppage *in transitu*. Where the bill of lading is negotiated by way of pledge, the right to stop *in transitu* remains subject to the pledgee's right in respect of his advance. (*In Re Westzynthius*, 5 B. & Ad. 817; *Kemp v. Falk*, 7 App. Cas. 573.)

Right of shipper under bill of lading retained by him as security.

Upon the sale of goods, where the shipper takes and keeps in his own hands a bill of lading making the goods deliverable to the shipper's order, with the intention of protecting himself, the effect of his so doing is to preserve to him a hold over the goods until the vendee has fulfilled or has been ready and willing to fulfil the conditions of the sale, and the hold so preserved is not merely a right to retain possession till these conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as he continues in default. (*Ogg v. Shuter*, 45 L. J. 44 App.)

When bill of lading countermandable.

A bill of lading after indorsement is countermandable before actual delivery thereof, or of the goods to the indorsee, but after the indorsement and delivery of the bill of lading and invoice of the goods as security against bills which are to be drawn by the indorsers on the indorsees, the indorsers cannot, after having obtained the acceptances, and whilst the balance of accounts is in favour of the indorsees, countermand the delivery of the goods; and the master of the ship would be liable in trover if he acted under any such countermand. But *semble aliter* if the balance of accounts was in favour of the indorsers. (*Haile v. Smith*, 1 B. & P. 563.)

Construction of ordinary clause in bill of lading.

Construction of.—The clause in a bill of lading by which the shipowner is not liable for rust, breakage, or leakage is limited to the injury to the goods damaged by their own rust, breakage, or leakage, and does not protect him from an action for damage by rust, breakage, or leakage of the goods of one person to those of another person. (*Thrift v. Youle and Co.*, 46 L. J. 402, 2 C. P. Div. 432. See further *Hayes v. Culliford*, 4 C. P. Div. 182.)

Particulars of damage :—

100 quarters, at 40s. . . .	£200	0	0
50 quarters, at 4s.	10	0	0
	£210	0	0

The plaintiff claims £210.

Defence.

The defendant says :

1. The damage and loss occurred from the bad condition of the goods when received.
2. Alternatively the damage and loss occurred by reason of the excepted perils mentioned in the bill of lading, that is to say, the perils of the seas (or fire, or as the case may be).

Action by Indorsees on Bill of Lading for Price of Goods Sold as Part of Cargo of Stranded Ship.

1. A. B., upon a contract by a bill of lading, signed by the master of the ship "Emerald," the defendant's agent, shipped goods, namely, four bales of silk, to be carried in the said ship by the defendant from Riga to Hull. The bill of lading has been indorsed by A. B. to the plaintiff.

2. The ship stranded on her voyage to Hull, and the defendant sold the said four bales of silk at C——, and received the purchase-money, which amounted to £100.

3. The plaintiff is indebted to the defendant in the sum of £50, under a claim for losses in respect of general and particular average and other particular charges in respect of the said ship, her freight, and cargo.

The plaintiff claims £50 as the balance.

Bonds (a).

Action on an Annuity Bond.

1. The plaintiff's claim is for principal and interest due upon the defendant's bond to the plaintiff, dated the 1st of

(a) A bond is a contract under seal to pay a stated sum of money. It is either absolute, in which case the obligation to pay the money is

January, 1883, and conditioned for payment to the plaintiff of £150 half-yearly, on the 1st of July and the 1st of January in every year during the life of the plaintiff.

2. Two instalments, of £150 each, due on the 1st of July, 1883, and the 1st of January, 1884, are due and unpaid.

Particulars :—

Principal	£300	0	0
Interest	5	0	0
	£305	0	0

The plaintiff claims £305.

Defence.

The defendant says :

1. The bond is not the defendant's bond.
2. Alternatively the defendant made payment to the plaintiff on the days appointed according to the condition of the bond.
3. Alternatively the defendant gave the bond in consideration of the plaintiff's promise to allow a criminal intercourse between her and the defendant to continue.

absolute ; or conditional, in which case the money is only payable conditionally, and ceases to be payable or absolutely payable on the happening or doing of a certain thing, *e.g.*, the payment of a less sum or the due performance of certain duties. If the condition is entire and unlawful, the bond is void (*Collins v. Blantern*, 1 Sm. L. C. 325); but if the condition is severable and part of it is good, the bond is valid to that extent. (*Yale v. Rex* (in error), 6 Br. P. C. 61.) In the case of alternative conditions, if one becomes impossible the other, as a general rule, becomes absolute. (*Da Costa v. Dares*, 1 B. & P. 242.)

If the condition be impossible at the time of making it, or uncertain or insensible, the condition is void and the bond unconditional. Blackstone's Commentaries by Stephen, II. p. 107.

No precise form of words is necessary to create a bond so long as there is a writing under seal, acknowledging a debt, or denoting an intention on the part of the person who becomes bound (obligor) to pay another (obligee) a specified sum of money, this is sufficient to constitute a bond. Thus, "I, A. B. have borrowed £10 of C. D.," or "Memorandum that A. owes B. £10," are sufficient. (See Addison, Contr. 7th ed. 171.) It is of course usual to introduce the words, "to be held and firmly bound," but neither these nor any other formal words of a similar kind appear to be necessary.

If no time is limited in a bond for payment, the money is payable on demand.

By the C. L. Proc. Act, 1852, s. 96, although judgment in actions on bonds might be entered up for the penalty, execution might only issue for the damages assessed by the jury.

Action on a Bond to Secure the Performance of Duty, and against Defalcations in Accounts.

1. The plaintiff's claim is for money and interest due upon the defendant's bond for £2000 to the plaintiff, dated the 1st of August, 1883, conditioned that if J. B. C. would faithfully discharge the duties of managing clerk to the plaintiff, and honestly account for and pay over to the plaintiff all moneys coming to his hands on behalf of the plaintiff during his service as such managing clerk, the bond should be void.

2. The said J. B. C., on September 15, 1883, and during his said service dishonestly appropriated to his own use £350, the moneys of the plaintiff.

Particulars :—

Principal	.	.	.	.	.	£350	0	0
Interest	.	.	.	.	.	8	0	0
						£358	0	0

The plaintiff claims £358.

Defence. (a)

The defendant says :

1. Before the 15th of September, 1883, J. B. C. misappropriated other moneys of the plaintiff, who, knowing of such previous misappropriations, continued to employ J. B. C. in his service without notice to the defendant; and the sum of £350 (if misappropriated at all by J. B. C.) was misappropriated during such continuance of the said service.

2. Alternatively J. B. C. did not misappropriate the said sum of £350, or any part thereof.

Breach of Contract.

See Sale—Stock—Work and Labour.

Action for Breach of Agreement by Defendants to make a Propeller Shaft, claiming Special Damage.

1. The plaintiff has suffered damage by the defendant's

(a) See *Philips v. Foxall*, L. R. 7 Q. B. 666, and *Sanderson v. Aston*, L. R. 8 Ex. 73, as to this defence.

breach of a written contract to make and deliver to the plaintiff on the 15th of November, 1883, at the Surrey Commercial Dock, a new brass liner to the propeller-shaft of the S.S. "Rio Tinto," and a new brass stern-bust for the same, both to be of best quality and workmanship.

2. Before the said contract was made, the defendant had notice that the plaintiff had contracted with the owners of the said ship to repair and refit the said ship by the 24th of November, 1883, and that if the defendant should not perform his said contract the plaintiff would be unable to perform his contract with the said owners, and would be liable to pay to them £300 for liquidated damages.

3. The new brass liner, and new brass stern-bust delivered by the defendant, were of bad quality and workmanship, and unfit for use.

4. By reason of the defendant's breach of contract the plaintiff was unable to perform his said contract with the said owners; and in an action brought by them against the plaintiff to recover the said sum of £300, and which the plaintiff defended at the request of the defendant, the plaintiff was ordered to pay £300 damages, and £87 for costs to the said owners, and the plaintiff paid them.

Particulars of special damage :—

Damages paid to the owners . . .	£300	0	0
Paid their costs as taxed. . . .	87	0	0
Plaintiff's costs of defending the action brought by the owners	103	0	0
	£490	0	0

The plaintiff claims £490.

Defence and Counter-claim.

Defence.

The defendant says that :

1. The defendant never had any notice of the plaintiff's alleged contract with the owners of the S.S. "Rio Tinto," or any other contract, or that the plaintiff would be liable in any

damages if he should not perform the alleged contract or any other contract.

2. The goods delivered were of the best quality and workmanship.

3. The defendant did not request the plaintiff to defend the action by the owners of the S.S. "Rio Tinto" or any other action.

Counter-claim.

The defendant says that:

1. He sold and delivered the new brass liner and new brass stern-bust to the plaintiff at the agreed price of £210 on the 15th of November, 1883.

The defendant claims £210.

Breach of Contract to build and deliver a Ship.

1. The plaintiff has suffered damage by breach of a contract in writing between the plaintiff and the defendant to make and deliver to the plaintiff at Hull, on November 30th, 1883, a screw steam-ship of 4,200 tons burden at the price of £100,000.

2. The defendant did not make or deliver such a ship or any ship at all.

Particulars of special damage:—

Increased price paid to A. B. for a similar ship	£9000	0	0
Paid for specifications and models of ship to be built and delivered by the defendant	300	0	0
Paid for use of similar ship from Nov. 30th, 1883, until January 17th, 1884, when A. B. delivered his ship	1000	0	0
	£10,300	0	0

The plaintiff claims £10,300.

Defence.

The defendant says that :

1. He tendered the ship contracted for to the plaintiff on November 30th, 1883, but the plaintiff refused to accept it.

2. By the contract it was agreed that if either the plaintiff or the defendant should fail in whole or in part to perform the contract, any claim arising thereby should be referred to the arbitration of A. B., and that no action should be brought for any breach of the said contract until after the said A. B. had arbitrated upon the claim arising upon such breach, and then only for the amount of the damages (if any) assessed by the said A. B.

3. The defendant has always been and is ready and willing to refer the plaintiff's claim to the said A. B., but the plaintiff refused and refuses to refer it (a).

Action for Breach of Agreement to make a Steam Roller by a certain day (time being of the essence of the contract) and claiming amount agreed for Liquidated Damages.

1. By a written contract dated 1st November, 1883, the defendant, in consideration of the sum of £1,500, agreed to make a steam roller and deliver it to the plaintiff on or before 1st December, 1883. By the contract it was provided that time should be of the essence of the contract, and that the defendant should pay to the plaintiff £400 as liquidated damages if the defendant should not deliver the steam roller on or before 1st December, 1883.

2. The defendant did not deliver the steam roller on or before 1st December, 1883.

The plaintiff claims £300 damages.

[This claim may be varied by omitting the averments that time was essential and the liquidated damages agreed and by substituting :—]

By the defendant's breach of contract the plaintiff was unable to execute a contract with A. B. of which the defendant had notice. It was a term of the contract between the plaintiff

(a) As to this plea see *Dawson v. Fitzgerald*, 1 Ex. Div. 257, and *Scott v. Avery*, 5 H. L. C. 811, 25 L. T. Ex. 308.

and the defendant, that if the defendant should fail to deliver as aforesaid he should be liable for any damage sustained by the plaintiff by reason of his being thereby rendered unable to perform his contract with A. B.

Particulars of damage :—

188	Damages paid to A. B.	. . .	£10	0	0
„	Loss of profit on contract with				
	A. B.		100	0	0
			£110	0	0

The plaintiff claims £110.

Defence.

The defendant says that :

1. The plaintiff was not ready and willing to pay the agreed price of the steam-roller.

2. The contract did not provide that £400 or any other sum should be paid as liquidated damages for breach.

3. The defendant had no notice of the plaintiff's contract with A. B., and it was not a term of the defendant's contract that upon breach he should be liable for any damages sustained by the plaintiff through his being unable to perform his contract with A. B.

4. On the 13th of November, 1883, and before breach, it was agreed, in writing, between the plaintiff and the defendant, that in consideration of a reduction of £100 in the price of the steam-roller, the time for the delivery of it should be extended until January 1, 1884.

5. On January 1, 1884, the defendant tendered the steam-roller to the plaintiff, but he refused to accept it.

Breach of Contract to Contribute towards the Expense of Floating a Company.

1. By a contract, in writing, dated the 15th of November, 1883, and made between the plaintiff and the defendant, the defendant agreed, in consideration of the allotment of certain shares to him, to contribute any sum, not exceeding £1000,

which might be required as his share equally with each of the plaintiffs towards the expenses of floating the R. T. G. Co. Limited, and interest thereon at £5 per cent. per annum.

2. The company was floated, and the defendant's share of the said expenses was £900. The shares have been allotted to him.

Particulars :—

Dec. 31, 1883.	Defendant's share of expenses	£900	0	0
„ „	Paid by defendant	. .	350	0 0
	Balance	. .	£550	0 0

The plaintiffs claim £550, and interest thereon from December 31, 1883, until payment or judgment.

Defence.

The defendant says that :

1. He denies that he ever contracted to pay £1000, or any sum towards the expenses of floating the R. T. G. Co. Limited, or any other company, or that the company was floated, or that his share of the expenses of floating was £900, or any other sum, or that any shares in the said company have been allotted to him.

2. The defendant's contract was to contribute a sum not exceeding £350 towards the expense of a joint-trading speculation on the coast of Peru with the plaintiffs.

3. The £350, paid by the defendant, was paid on account of the expenses of the said joint-trading speculation, and not otherwise.

Claim for Breach of Contract to employ Plaintiff in Erection of a House.

1. By an agreement, in writing, of the 1st of May, 1880, the defendant contracted to employ the plaintiff in the erection of a dwelling-house at A., and to pay the agreed sum of £1500 when the said dwelling-house was completed.

2. The defendant has refused to allow the plaintiff to complete the erection of the said house, and the plaintiff has not received any portion of the said sum of £1500.

The plaintiff claims £500 damages.

188—. No. .

In the High Court of Justice,
Queen's Bench Division.

Between A. B. . . . Plaintiff,
and
C. D. . . . Defendant.

(By original Action.)

And between the said C. D. . . . Plaintiff,
and

The said A. B. and E. F. . . . Defendants.
(By Counter-claim.)

Defence and Counter-claim.

Defence.

The defendant says :

1. It was a term of the said agreement of the 1st of May, 1880, that if the plaintiff did not construct the works mentioned therein according to the satisfaction of M. N., the defendant's surveyor, the defendant might at any time dismiss the plaintiff from further proceeding with the said works and employ some one else.

2. The plaintiff did not construct the said works according to the satisfaction of the said M. N., whereupon the defendant dismissed him from further proceeding with the same, which is the grievance complained of.

Counter-claim.

The defendant repeats paragraphs 1 and 2 of the defence, and says further :

3. That by reason of the plaintiff's failure to construct the said works according to the satisfaction of the said M. N., he was put to great expense in employing other persons to do the said work. Particulars of the expenses to which the defendant was put were delivered before action brought.

4. On the 1st of May the defendant E. F., by his bond of that date, covenanted that he would indemnify the defendant to the extent of £200 for any loss which he might sustain by

the plaintiff's failure to complete the said contract of the 1st of May.

5. The plaintiff has failed to complete his said contract, and the defendant has suffered a loss exceeding £200.

The defendant counter-claims :—

- (1) Against the plaintiff for £—— damages ; and
- (2) Against the defendant E. F. for the sum of £200.

(Heading as in the last Form.)

Reply of Plaintiff A. B.

1. The plaintiff joins issue upon the defence.
2. As to the counter-claim the plaintiff says that the said works were constructed to the satisfaction of the said M. N.
3. The defendant was not put to any expense by the alleged failure of the plaintiff to construct the works to the satisfaction of M. N.

Reply of Defendant E. F.

1. The defendant E. F. did not covenant that he would indemnify the plaintiff to the extent of £200, or any other sum, for any loss he might sustain by the failure of the plaintiff to complete the said works to the satisfaction of the said M. N.
2. The plaintiff did not fail to complete the said works to the satisfaction of M. N.
3. If he has so failed, the defendant has not sustained any damage.

Breach of Promise to Marry (a).

Claim by Plaintiff for Breach of Promise to Marry.

1. The plaintiff has suffered damage by breach of promise by the defendant to marry her on the 14th of November, 1883 [or,

Promise
to marry
need not be
evidenced
by writing.

(a) A promise to marry on which an action is based, need not be evidenced by any writing, and may be proved entirely by parol, though it is well to remember that by the 32 & 33 Vict. c. 68, s. 2, it is provided that "no plaintiff in any action for breach of promise of marriage shall

within a reasonable time, which elapsed before action] [*or*, on the death of A. B., which happened before action].

2. The defendant refused to marry the plaintiff on the 14th of November, 1883 [*or*, within a reasonable time] [*or*, on the death of A. B.].

Particulars of special damage :—

Nov. 1883.	Loss of appointment of head milliner at Messrs. X., Y., & Z.'s			
	at salary of £2 a week, viz.	£100	0	0
„	Cost of trousseau	95	0	0
		£195	0	0

The plaintiff claims £695.

recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." As to what amounts to corroboration within this section, see *Beasley v. Stern*, 46 L. J. 467, 2 C. P. D. 265. An infant may sue in such an action, but is not liable to be sued. (*Holt v. Ward*, 2 Str. 937.) The action falls within the rule *actio personalis moritur cum persona*, and cannot be maintained by an executor or administrator. (*Chamberlain v. Williamson*, 2 M. & S. 408.)

Corroboration of plaintiff essential.

The averments in the claim are generally very simple. There is first a statement of the agreement to marry, and then in another paragraph a statement of a breach of such promise. There may be a breach by refusal to perform the contract, although the time for performance has not arrived, as where A., having promised to marry B. on C.'s death, in C.'s lifetime absolutely refused to marry B. (*Front v. Knight*, L. R. 7 Ex. 111.) The jury in assessing damages may take into account the position in life and means of the defendant, and also the injury to the plaintiff's feelings. (*Smith v. Woodfine*, 1 C. B. N. S. 660; *Herry v. Da Costa*, L. R. 1 C. P. 331.)

Averments in the statement of claim.

Measure of damages.

Among the defences that may be set up are : 1. That the defendant never promised to marry the plaintiff; 2. That he promised conditionally, and the condition has not yet been fulfilled; 3. That *since* the promise the defendant has discovered that the plaintiff has been guilty of gross immorality or depraved conduct, of which he or she was ignorant at the time of the engagement (*Irving v. Greenwood*, 1 C. & P. 350); 4. That the plaintiff has been guilty of material misrepresentation as to the real circumstances of his or her family, and his or her previous life (*Wharton v. Lewis*, 1 C. & P. 529); 5. That the plaintiff has exonerated the defendant from his or her promise. Such an exoneration may be implied from the demeanour and conduct of the parties. The total cessation of intercourse and correspondence for two or three years is evidence for the jury on a plea of exoneration, although on the last occasion they were seen together the plaintiff refused to give up the defendant's letters, saying it would be like giving him up altogether. (*Davis v. Bomford*, 6 H. & N. 245.) 6. The Statute of Limitations, which, in the case of this action, is a bar after the lapse of six years from the breach of the promise.

Immorality of plaintiff, when a defence.

When an exoneration by the plaintiff will be implied.

It has been decided, however, that bodily infirmity, supervening after the promise and rendering it dangerous to the defendant's life to marry,

Defence.

The defendant says that :

1. He was an infant at the time of making the alleged promise.
2. The defendant was exonerated by the plaintiff before breach. Particulars are as follows :—An arrangement between the plaintiff and the defendant made verbally on the 1st of October, 1883.
3. When the defendant made the alleged promise he was not aware, nor was he aware until the 1st of October, 1883, that, as the fact was, the plaintiff had been seduced and had borne an illegitimate child in the year 1881 (b).

Claim for Breach of Promise to Marry, alleging Seduction as Matter of Aggravation (c).

1. The plaintiff has suffered damage by breach of promise by the defendant to marry her within a reasonable time, which elapsed before action.
2. The plaintiff, relying upon the said promise, permitted the defendant to debauch and carnally know her, whereby the defendant infected her with a venereal disease.

What will not constitute a defence to this action.

is no answer to an action for breach of promise to marry (*Hall v. Wright*, E. B. & E. 746, 765) ; so on the authority of the last case, insanity in the plaintiff existing unknown to the defendant previously to his promise, was held to be no defence (*Baker v. Cartwright*, 10 C. B. N. S. 124) ; so a pre-contract on the part of the plaintiff to marry another person, which the plaintiff concealed from the defendant at the time of his promise, is no defence to the action without fraud (*Beechey v. Brown*, E. B. & E. 796) ; so it is no defence that the defendant is a married man, and was married when he promised, provided the plaintiff was ignorant of the fact. (*Millward v. Littlewood*, 5 Exch. 775.)

A ratification after majority of a promise made by an infant is void (37 & 38 Vict. c. 62, s. 2), but as to what amounts to a fresh promise, and what to a mere ratification of the old promise, see *Corhead v. Mullen*, 3 C. P. D. 439 ; *Northcote v. Doughty*, 4 C. P. D. 385 ; and *Ditcham v. Wurrall*, 5 C. P. D. 410.)

(b) Unless supported by very clear evidence this is a very dangerous plea.

(c) The seduction alleged in the second paragraph does not give the plaintiff a new cause of action, but it is properly pleaded as a "material fact" (R. S. C. Order XIX., r. 4). Even if it were not a statement of "material fact" the Court will not strike it out, for it is neither scandalous nor does it tend to prejudice or embarrass the fair trial of the action. (*Millington v. Loring*, 6 Q. B. Div. 190, C. A.)

3. The defendant refused to marry the plaintiff within a reasonable time.

Particulars of special damage :—

Nov. 1883. Dr. Smith for medical attendance £10 10 0

The plaintiff claims £1000.

Charter-Party (a).

1. *Statement of Claim in Action by Ship Owner against Charterer for Detention beyond the Demurrage Days.*

1. The plaintiff has suffered damage by breach of a charter-party, dated the 10th of March, 1882, between the plaintiff and the defendant, of the ship "May."

2. The ship was detained at the port of loading.

(a) "A charter-party is a contract whereby the ship-owner or the ship-master covenants or agrees for the use of the ship by the charterer for some specified period of time, or for a particular voyage or adventure" (Addison on Contracts, 7th ed., 718). The ship-owner by the charter-party expressly grants the vessel to be used by the charterer, but this will not generally (though sometimes it will be otherwise, see *Trinity House v. Clark*, 4 M. & S. 295; *Hutton v. Bragg*, 7 Taunt. 14) be regarded as a demise of the ship, so as to clothe the charterer with the possession of the vessel, but simply as a contract for the use of the ship, together with the services of the master and crew, for the purpose of carrying merchandise.

Definition of charter-party.

The duty of the charterer is to load his cargo on board within the agreed time, and there is also an implied contract on his part not to put on board without notice packages of dangerous or corrosive matter, the nature of which the ship-owner or his agents could not be reasonably expected to know. (*Brass v. Maitland*, 6 E. & B. 470; L. J. 26 Q. B. 49.) The duty of the ship-owner is to fulfil all the terms of the charter-party and safely convey the goods to their destination, the loss arising from certain perils being excepted, and his right is either then or before (if, but only if, it has been so expressly agreed) to receive the freight due to him.

Correlative rights and duties of charterer and ship-owner.

A deviation from the course of the voyage to save life is justifiable, but not to save property; and if the ship deviates with the latter object the shipowner is liable to the charterer for any loss. (*Scaramanga v. Stamp*, 5 C. P. Div. 295; 49 L. J. 674.)

If the charterer fails to load a cargo, or loads an insufficient cargo so that the ship-owner cannot claim the full amount of freight to which he is entitled by the terms of the charter-party, he is liable for damages in an action by the ship-owner. In an action for not loading, the ship-owner must prove at the trial, compliance with all warranties and conditions on his part. The description of a ship may be a warranty. Thus, if she be described as of class A 1 and is not so, this would be an answer to an action for not loading (*Hurst v. Osborne*, 18 C. B. 144; L. J. 25 C. P. 209); so a description of a ship as "now in a particular port"

Particulars of damage:—

1882. 10 days' detention beyond the
Jan. 1 to demurrage days at £25 a
Jan. 10. day £250 0 0

The plaintiff claims £250.

What constitutes a warranty or condition precedent.

amounts to a warranty that she really is there (*Behn v. Burness*, 3 R. & S. 751; L. J. 32 Q. B. 204); so "now at sea, having sailed three weeks ago," is a condition precedent. (*Ollive v. Booker*, 1 Exch. 416.)

Where the ship is chartered for a *given time* and not for a *voyage* merely, the stipulation as to the time when the ship shall be ready to sail or to load is a condition precedent (*Seegar v. Duthie*, 8 C. B. N. S. 45, 72; L. J. 30 C. P. 65; *Tully v. Howling*, 45 L. J. 756; 2 Q. B. D. 182); and delay, even though caused by the excepted perils, when so great as to put an end in a commercial sense to the speculation, exonerates the charterer. (*Jackson v. Union Marine Insurance Co.*, L. R. 8 C. P. 572; L. R. 10 C. P. 125; 44 L. J. C. P. 27.)

There is an implied warranty on the part of the ship-owner that his ship shall be seaworthy at the commencement of the voyage, and where she was not, and in consequence the charterer's cargo was lost, it was held that he could recover its value from the ship-owner (*Kopitoff v. Wilson*, 1 Q. B. D. 337; 45 L. J. Q. B. 436; *Cohen v. Davidson*, 46 L. J. 305; 2 Q. B. D. 459; *Stanton v. Richardson*, 45 L. J. 230 (H. L.)). The measure of damages for not loading any cargo is the amount of freight which would have been carried, deducting expenses and any profit earned during the time covered by the charter.

Demurrage, when action for lies.

Demurrage.—The charterer usually covenants to load and unload the vessel within a certain time, or if he fails to do so, to pay so much a day during the delay. This delay as well as the payment is called demurrage. The days which by the charter-party are allowed to the charterer to load or unload are called lay days; and these days are, in the absence of a contrary usage, to be taken as consecutive or running days. (*Brown v. Johnson*, 10 M. & W. 331.) The lay days allowed are to be reckoned from the time of the ship's arrival at the usual place of discharge, and not from her arrival at the entrance of the port, although for the purposes of navigation she may have discharged a portion of her cargo (*Brereton v. Chapman*, 7 Bing. 559; *Kell v. Anderson*, 10 M. & W. 498); and where by a charter-party a specified sum is to be paid for each day over and above the lying days, that sum is payable in respect of a fraction of a day during which the ship is detained. (*Commercial Steamship Co. v. Boulton*, 44 L. J. Q. B. 219.) When the charter-party is silent as to the time of loading and unloading, the contract implied by law is that each party will use reasonable diligence in performing that part of the loading or delivery which by the custom of the port falls upon him. The charterer cannot escape from liability on his express covenant to pay demurrage by showing that the delay was occasioned by some unforeseen event not provided for by the contract, such as the crowded state of the docks (though here it may be otherwise if there is a custom of the port that ships of the kind should not be considered as arrived until they get a discharging berth within the dock (*Steamship Co., Norden v. Dempsey*, 45 L. J. 764); or the delay of Custom-house officers, or the inclemency of the weather (*Blight v. Page*, 3 B. & P. 295), or the neglect of the holders of the bill of lading to present it and claim the goods. (*Erichsen v. Barkworth*, 3 H. & N. 894; L. J. 23 Ex. 95; *Tiss v. Byers*, 45 L. J. 511; 1 Q. B. D. 244.) But if *after the loading has been completed*, the vessel is detained by a sudden frost or by

Delay occasioned by unforeseen events.

2. Statement of Claim in Action by Ship Owner against Charterer for Refusing to Load.

1. The plaintiff has suffered damage by breach of a charter-party, dated the 1st of January, 1882, between the plaintiff and the defendant, of the ship "S."

2. The defendant refused to load the said ship, and she was detained at the port of K. for thirty days before the plaintiff could obtain another charter-party for her.

Particulars of damage :—

(1.) 1881.	30 days detention of the said	
March 1 to	ship beyond the demurrage	
March 31.	days at £10 a day . . .	£300 0 0

(2.)	Difference between the freight the plaintiff would have earned under the charter-party of the 1st of January, 1882, and the freight he did earn	£100 0 0
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The plaintiff claims £400.

foul weather and contrary winds, the charterer is not liable. (*Jamieson v. Laurie*, 6 Bro. P. C. 474.)

Freight.—Either the master or the ship-owner may sue for freight, but in the absence of agreement, no freight is due until the goods be carried to their destination, and then freight is to be calculated and paid on that amount only which is put on board, carried throughout the whole voyage, and delivered at the end to the merchant. (*Gibson v. Sturge*, 10 Exch. 639; L. J. 24 Ex. 121.) Where the ship-owner carries the cargo to the port of destination, but from the nature of the cargo is unable to land it there, the freight becomes payable; and if the prudent course for the master to adopt is to bring the cargo home again, he is entitled to be paid back freight as well as the expenses incurred in endeavouring to land the cargo. (*Gaudet v. Brown*, L. R. 5 P. C. 134.) Though freight is, as stated, only payable on the safe arrival of the cargo at the port of destination, still payments made in advance on account of freight cannot be recovered back although the ship is lost. (*Byrne v. Schiller*, L. R. 6 Ex. 20,319.) The ship-owner may recover freight *pro rata*, if the shipper accepts part of the goods, though carried under an entire contract for freight (*Mitchell v. Dartley*, 2 N. C. 555); or accepts the goods before the completion of the voyage. (*Vleirboom v. Chapman*, 13 M. & W. 238.) The foundation of any claim for freight *pro rata* is an agreement between the ship-owner and the charterer that delivery shall be accepted at an intermediate port, and freight *pro rata* paid for it, because, "according to the terms of an ordinary charter-party or bill of lading, the whole voyage must be accomplished before any freight becomes payable. The master cannot, by wrongfully stopping short of the place of destination, compel

Freight when payable.

Pro rata freight.

Defence.

1. At the time of the entering into the said charter-party of the 1st of January, 1881, the plaintiff described the "S." as being then classed A 1. The "S." was not at that time classed A 1.

2. The defendant further says that the "S." did not arrive at the loading port by the 1st of February, 1881, and thereupon the charter-party of the said 1st of January was cancelled pursuant to a cancelling clause therein.

3. *Claim by Ship Owner against Charterer for Agreed Hire of Chartered Vessel.*

1. By a charter-party dated the 3rd of August, 1880, between the plaintiff of the ship "Queen" and the defendant, the defendant chartered the said ship for the period of four months for the monthly sum of £1,000.

2. The "Queen" made several voyages under the said charter-party extending over the agreed term of four months.

The plaintiff claims £4,000.

Defence.

1. By the charter-party sued upon, it was provided that if any accident should happen or any repairs should become necessary to the engines or boilers of the said ship, the defendant should be allowed a deduction of £20 a-day from the charter-money for each day occupied in the making of such repairs.

2. On the 10th of September, 1880, repairs became necessary to the engines and boilers of the said ship, and ten days were occupied in effecting such repairs.

3. Before action brought the defendant tendered to the

the owner of the goods to take them and pay the freight even for the part of the voyage performed, any more than the charterer, on the other hand, can insist on having the cargo delivered at an intermediate place, so as to deprive the ship-owner of the opportunity of earning the full freight." (*Per Cockburn, L.C.J.*, in *Metcalfe v. Britannia Iron Co.*, 45 L. J. 837; 46 L. J. 443; 1 Q. B. D. 613; 2 Q. B. D. 423. And see also as to freight, *pro rata*, *Hooper v. Burness*, 1 C. P. D. 137; 45 L. J. C. P. 377; *Hill v. Wilson*, 4 C. P. D. 329; 48 L. J. C. P. 764.)

plaintiff the sum of £3800 in full satisfaction of his claim herein, which the defendant refused to accept.

4. The defendant brings into Court the sum of £3800, and says that the same is sufficient to satisfy the plaintiff's claim herein.

Reply.

The plaintiff joins issue on the defence.

4. Claim in an Action for Expenses for Discharging Cargo on Defendant's refusing to do so, and for Demurrage.

1. The plaintiff has suffered damage by breach of a charter-party dated the 16th of September, 1876, made between the plaintiff, the owner of the ship "Royal," and the defendant.

2. The defendant refused to unload and take delivery of the cargo, and the plaintiff was compelled to discharge the same.

Particulars of damage :—

1876. 3rd to	Expenses of discharging	
7th Dec.	the cargo	£250 0 0
8th Dec.	Paid by the plaintiff for lighterage of the cargo from Neve to Amster- dam	130 0 0
1st Dec. to	Detention of the ship for	
10th Dec.	ten days at £10 a day .	100 0 0

The plaintiff claims £480.

Defence.

1. The "Royal," instead of, in accordance with the charter-party, completing her voyage and proceeding to Amsterdam or so near thereto as she could safely get, proceeded only to Neve, a place not within the port of Amsterdam, and the captain, despite the protest of the defendant, discharged the cargo there and had it warehoused.

2. The said ship could have proceeded to Amsterdam or much nearer thereto than Neve.

3. There is a well-known custom of the port of Amsterdam, whereof the plaintiff had notice when the said charter-party was

signed, whereby the owners of all vessels chartered as aforesaid, bound for Amsterdam, if such vessels discharge their cargoes at Neve, pay the expenses of and incidental to the discharging and conveying them by lighters to Amsterdam.

5. Claim in Action for Balance of Freight or in the Alternative for Damages.

1. On the 24th September, 1876, the defendant chartered the plaintiff's ship, the "Zebra," by a charter-party of that date for a voyage from A. to B. at an agreed freight of £4138.

2. The "Zebra" performed the said voyage from A. to B.; but the defendant has only paid to the plaintiff £3995 in respect of such freight.

3. In the alternative the plaintiff says that after the said charter-party was entered into and upon the arrival of the "Zebra" at A., the defendant refused to load her, and in consequence the plaintiff was compelled to load the said vessel at a lower rate of freight and he has lost the sum of £143, the difference between the freight the defendant agreed to pay and the freight the plaintiff actually obtained.

The plaintiff claims £143.

Defence.

1. The "Zebra" did not arrive at A. until after the 20th of December, 1876, whereupon the defendant cancelled the charter-party in pursuance of a clause therein authorising its cancellation.

2. The defendant afterwards offered to load the vessel, upon the captain of the "Zebra," with the plaintiff's approval, entering into a fresh charter-party to proceed from A. to B. at an agreed freight of £3995, and the captain of the "Zebra," with the plaintiff's approval, duly entered into such charter-party.

Reply.

1. The plaintiff admits that the "Zebra" did not arrive at A., until after the 20th December, 1876, but the defendant did not thereupon or at all cancel the said charter-party.

2. If the defendant did cancel the said charter-party, the notice cancelling the same was not given within a reasonable

time after the 20th December, 1876, as provided by the terms of the said charter-party.

3. If the master of the said ship accepted the said offer in the 2nd paragraph of the statement of defence mentioned, which the plaintiff does not admit, and effected a charter-party as mentioned, he did so without the authority of the plaintiff.

4. The defendant, on the arrival of the said ship at A., and before the alleged cancelment of the said first charter-party, and before the effecting of the said alleged second charter-party, had loaded the said agreed cargo under the charter-party in the statement of claim mentioned.

Rejoinder.

The defendant joins issue upon the reply.

6. *Claim in Action for Difference between Estimated Amount of Freight under Charter-party and Amount paid, part of Cargo being made up of Lighter Material than agreed.*

1. By charter-party bearing date the 2nd of October, 1876, it was agreed between the plaintiff and the defendant that the plaintiff's ship, the "H.," should proceed to B. and there load from the defendants a full and complete cargo of seed and then proceed to C. and deliver her said cargo at an agreed freight of 40s. per ton.

2. The defendant did not load the "H." with a full and complete cargo of seed but only with 2000 bags of seed.

3. It was then agreed between the plaintiff and the defendant that the defendant should be at liberty to fill the said ship with cotton, paying the plaintiff for any extra ballast required, and indemnifying him from any loss of freight by reason of the shipment of cotton instead of seed.

Particulars of claim :—

Difference between freight plaintiff obtained and the freight that would have been earned if complete cargo shipped	£330	0	0
Paid for extra ballast	50	0	0

The plaintiff claims £380.

7. Claim against Shipowner for not accepting Cargo.

1. The plaintiff has sustained damage by breach by the defendant of a charter-party of the 1st May, 1880, by which he agreed that his ship, the "C.," should forthwith proceed to P. and load a cargo of mules belonging to the plaintiff, and carry them to S.

2. The said ship did not forthwith or at all proceed to P.

3. The plaintiff had a contract with the English Government by which if the said mules had been forthwith shipped at P. and conveyed to S., the latter would have purchased them, and the defendant had notice of the said contract, and the said charter-party was entered into with reference to it.

Particulars of damage :—

Loss of profit on the said contract	. £1100	0	0
Cost of conveying mules to and from the port of P., and the charge of their keep while there	. . .	120	0 0

The plaintiff claims £1220.

Defence.

1. The defendant did not enter into the charter-party alleged in the statement of claim or any other charter-party.

2. The plaintiff did not have the contract with the English Government mentioned in the statement of claim.

3. If he had, the defendant had no notice or knowledge of it; and if any charter-party was entered into, it was not with reference to any such contract.

4. After the failure of the "C." to arrive at P., the plaintiff had ample time and opportunity to charter another vessel to convey the said mules to S. for delivery within the terms of his alleged contract with the English Government.

8. Claim in an Action against Shipowner for refusing Service of the Crew in taking Cargo on Board.

1. By a charter-party dated the 1st of September, 1880, between the plaintiff and the defendant, of the ship "Argus," it was agreed that the "Argus" should proceed from L. to N., and there take on board a cargo of iron, and that in loading

the said ship the plaintiff should have the services of the ship's crew free of charge.

2. The plaintiff brought a cargo of iron alongside the said ship in lighters, but the defendant refused to take it on board for several days, and then refused to allow the plaintiff the use of the ship's crew in loading.

Particulars of damage :—

2nd to 5th Dec. 1880.	Paid labourers to load the said ship	£130	0	0
27th Nov. Dec. 1880.	Extra lighterage charge in consequence of defendant's refusal to accept the cargo	30	0	0

The plaintiff claims £160.

9. *Action against Shipowner for Loss of Cargo owing to the Ship not being Seaworthy.*

1. On the 3rd of June, 1880, the plaintiff shipped a cargo of pig-iron on board the defendant's ship, the "Excelsior," under a charter-party of the 10th of May, 1880, by which the said ship was to proceed to B. and there deliver the said cargo.

2. The "Excelsior" sailed on the 4th of June, and was lost at sea on the 5th of June, with the plaintiff's cargo on board.

3. At the commencement of the said voyage, the "Excelsior" was not seaworthy, and she was lost in consequence.

Particulars of damage :—

The value of the cargo	£4000	0	0
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The plaintiff claims £4000.

10. *Claim by Shipowner for Freight.*

The plaintiff's claim is for freight earned by his ship, the "L.," under a charter-party of the 1st of January, 1880, made between the plaintiff and the defendant.

Particulars :—

3rd to 20th Jan. 1880.	450 tons of coal at 10s. per ton	£225	0	0
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11. *Claim in an Action for Freight, pro rata.*

1. By a charter-party, dated the 2nd of July, 1880, the defendant chartered the plaintiff's ship, the "Mary," to carry

a cargo of pig-iron from Hartlepool to Bombay at an agreed freight.

2. The said ship, the "Mary," was loaded with a full cargo of pig-iron, and proceeded on her voyage as far as Suez, when it was verbally agreed between the plaintiff and the defendant that the said iron should be discharged thereat, and that the defendant should pay £—— to the plaintiff as freight *pro rata* for the portion of the agreed voyage that had been completed.

The plaintiff claims £1850.

Defence and Counter-claim.

Defence.

1. It was not agreed between the plaintiff and the defendant, as alleged in the 2nd paragraph of the statement of claim, nor was any agreement made.

2. On the arrival of the "Mary" at Suez, the plaintiff, without the consent of the defendant, unloaded the said iron, and caused it to be warehoused.

Counter-claim.

3. The defendant repeats the allegations contained in the last paragraph, and says further :

4. That the plaintiff, in breach of the charter-party, mentioned in the statement of claim, neglected to cause his ship, the "Mary," to proceed to Bombay, and deliver there the said cargo of iron, whereby the defendant has sustained damage.

Particulars of damage :—

Sept., 1880.	Warehouse charges at Suez . . .	£70	0	0
Oct. ,,	Freight paid for conveying the iron from Suez to Bombay . . .	820	0	0
Nov., 1880.	Difference between the market price of the iron when it would have arrived at Bom- bay, if the plaintiff had not broken the charter-party, and the time when it did arrive, a loss of	300	0	0

The defendant claims £1190.

Reply.

1. The plaintiff joins issue upon the defence.
2. The plaintiff as to the counter-claim says that it was agreed between the defendant and him that delivery of the iron should be accepted at Suez, and that the said charter-party should then be cancelled. The said iron was unloaded accordingly, and the plaintiff was discharged from any further fulfilment of the terms of the charter-party.
3. When the iron arrived at Bombay, the market price was higher than it was at the time when it would have arrived there had the said charter-party not been cancelled; and if the defendant has sustained any loss upon the sale of the iron, such loss was caused by his unduly delaying its sale.

Rejoinder.

The defendant joins issue upon the reply.

12. *Claim in an Action against Shipowner for Damage to Goods shipped.*

1. The plaintiff on the 30th of August, 1881, shipped a general cargo, including 100 bales of cotton, on board the defendant's ship, the "Philip," under a charter-party, of the same day, by which the defendant undertook that his servants and agents should load and stow the said cargo, and the "Philip" should proceed from Calcutta to London, and there deliver the said cargo to the plaintiff's order.
2. The plaintiff has sustained damage by the defendant's breach of the charter-party in this respect, that his servants so negligently stowed the said cargo along with certain casks of paraffin and petroleum, that 50 bales of the said cotton were injured and rendered worthless by the said paraffin and petroleum.

The plaintiff claims £600.

*Defence and Counter-claim.**Defence.*

1. The casks of paraffin and petroleum, mentioned by the plaintiff in his statement of claim, were delivered by the plaintiff on board of the "Philip," and he failed to give the defendant any notice of the contents of the said casks, and that they were of a dangerous and inflammable character.

2. The said casks were carefully loaded and stowed away by the defendant's servants, and the damage done to the plaintiff's cotton was not due to any negligence on their part.

Counter-claim.

3. The defendant says the agreed freight for the said cargo was £2500. The plaintiff has paid £2000, but he refuses to pay the balance.

The defendant claims £500.

Reply.

1. The plaintiff joins issue upon the defence.

Cheques.

See *Bills of Exchange—Bankers.*

Chose in Action (a).*1. Claim by Assignee of a Grocer's Bill.*

1. On the 3rd of May, 1880, the defendant was indebted to John Smith, of Newtown, grocer, in the sum of £43 10s., for

Provision
of Judica-
ture Act,
1873, as to
assignment
of choses
in action.

(a) By the 25th section, sub-sect. 6, of the Judicature Act, 1873, it is enacted "*any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law, subject to all the equities which would have been entitled to priority over the right of the assignee if this Act had not passed, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all*

goods supplied between the 2nd of February, 1880, and the 3rd of May, 1880, and upon an account stated on the latter day between the defendant and the said John Smith.

2. On the said 3rd of May the said John Smith absolutely assigned to the plaintiff by agreement, in writing, under his hand, the said debt of £43 10s., and express notice in writing was given to the defendant of such assignment.

The plaintiff claims £43 10s.

Defence.

1. On the said 3rd of May the defendant was only indebted to the said John Smith in the sum of £35, and no account was on that date, or ever settled between the defendant and John Smith shewing a larger sum than £35 to be due.

legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees." Prior to this enactment the law (except in the case of an assignee of a policy of insurance) was that an assignee of a chose in action or debt could not sue the debtor in his own name; he must sue in the name of his assignor. Now in the cases which fall within sect. 25, sub-sect. 6, the assignee is entitled, upon compliance with the requisitions of the statute, to sue the debtor directly in his own name. It must be observed that only *absolute* assignments are within the sub-section. Therefore an assignment of a chose in action by way of *mortgage* to secure an advance made to the assignor will not enable the assignee to sue the original debtor in his own name. This was expressly decided in the case of the *National Provincial Bank of England v. Harle*, 50 L. J. 437.

The assignee where he takes by an absolute assignment of the chose in action, now stands exactly in the shoes of his assignor. He has the same rights against the debtor as his assignor has; neither more nor less. The debtor is not in any way to be prejudiced by the fact of the assignment, and he is entitled to set up as a defence to an action brought by the assignor, everything which would be a defence in part or in whole against the assignor. Thus in *Young v. Kitchen* (3 Ex. Div. 127; 26 W. R. 408), as a defence to a claim by the plaintiff as assignee of the balance of a debt due from the defendant to D. for work done under a contract, the defendant counter-claimed against the plaintiff for damages for breach of the contract by D., and it was held that the defendant was entitled to counter-claim for such damages, but only as a set-off to the plaintiff's claim. In such a case the counter-claim should show on the face of it that the defendant does not seek damages against the plaintiff. (*Per Cleasby, B.*)

Debtor in action on assignment of debt may set-off claim against debtor, but may not counter-claim for it.

2. The said John Smith did not absolutely assign the debt mentioned in the statement of claim, or any other debt to the plaintiff.

3. Express notice in writing was not given to the defendant of such assignment, or of any assignment.

Reply.

4. The plaintiff joins issue upon the statement of defence.

2. Claim by Assignee of a Sum Awarded to the Assignor.

1. In the month of August, 1876, a claim for a large sum of money, which one William Wood, of Wigan, had made against the defendant, was referred by the said William Wood and the defendant to the arbitration of John Tomkins, Esq., of Preston.

2. The said John Tomkins, Esq., by his award made on the 18th of September, 1876, awarded that the defendant should pay to the said William Wood the sum of £550.

3. On the 15th of September, 1876, the said William Wood in writing absolutely assigned all his interest in the said sum of £550 to the plaintiff, and the plaintiff forthwith gave express notice in writing to the defendant of such assignment.

The plaintiff claims £550.

Defence and Counter-claim.

Defence.

1. As to the 1st paragraph of the statement of claim the defendant says, that in addition to the claim of the said William Wood against the defendant, a large claim which the defendant had against the said William Wood was also referred to the said John Tomkins, Esq., and he was required to give his award as to all matters in difference between the parties.

2. The award of the said John Tomkins, Esq., is bad in law because he wholly failed to consider the defendant's claim against the said William Wood, and has made no award determination in regard thereto.

Counter-claim.

And by way of set-off and counter-claim—

3. The defendant says that his claim against the said William Wood which the said John Tomkins, Esq., failed to consider and award upon was for £700 damages for failure to deliver 200 tons of iron in accordance with a contract in writing dated the 3rd of March, 1876, made between the defendant and the said William Wood. Full particulars of the said damages are delivered to the said William Wood.

4. The said sum of £700 is still due.

The defendant claims to set-off against the said sum of £550—the said sum of £700.

Reply.

1. The plaintiff joins issue upon the defence.

2. As to the counter-claim the plaintiff says that the said John Tomkins, Esq., fully considered the defendant's said claim of £700, and wholly disallowed it, and awarded that nothing was due to the defendant in respect of it.

3. Claim upon the Sums Due on a Building Contract assigned to the Plaintiff.

1. R. S., lately of K., did certain work as a builder for the defendant prior to the 10th May, 1877, and there was then due to him from the defendant in respect of such work the sum of £100 15s. 6½d. Full particulars of the said sum have been delivered to the defendant.

2. On the 10th May, 1877, the said R. S. absolutely assigned to the plaintiff by agreement in writing the said debt of £100 15s. 6½d.; and on the 16th May, 1877, express notice in writing was given to the defendant of the said assignment.

The plaintiff claims £100 15s. 6½d.

*Defence and Counter-claim.**Defence.*

1. The sum of £100 15s. 6½d. claimed in this action is made up of a sum of £40 0s. 6d., alleged to be the balance

remaining due of R. S.'s contract price for doing the work in the said claim referred to, and also of divers sums claimed in respect of extras.

2. As to the said £40 0s. 6d., it was a condition of the defendant's contract with the said R. S. that the said balance should not be payable until two months after the works should have been certified by the architect to be completed, and then only upon production of his certificate.

3. The said works have not been completed. Such certificate has not been given. Alternatively two months did not elapse after the giving of any such certificate before this action was brought, and further no such certificate has been produced to the defendant.

4. As to the sums which are claimed in respect of extras it was a condition of the defendant's contract with the said R. S. that no charge or allowance should be made for any extras unless the same should have been ordered in writing by the defendant's architect. None of such extras claimed for were ordered in writing by the defendant's architect or were otherwise ordered by the defendant.

Counter-claim.

1. The said contract contained a clause whereby it was provided that the said R. S. should complete the works by the — of —, or in default pay to the defendant a sum of £3 a day for every subsequent day during which the works should remain unfinished, and they so remained unfinished for 32 days, to the —.

The defendant counter-claims for £96.

4. *For a Claim by Assignee of Policy of Insurance, see Title Insurance.*

Clergyman.

Claim by a Clergyman who has resigned his Benefice for Payment of Pension (a).

The plaintiff's claim is, as the late incumbent of the benefice of C., in the county of C., against the defendant as the now incumbent of the said benefice, for the sum of £225, being one half-year's pension due to him out of the revenues of the said living by virtue of a declaration made under the hand of the Bishop of —, in accordance with the provisions of the Incumbents' Resignation Act.

The plaintiff claims £225.

Claim by Incumbent of a Parish against the Retired Incumbent for Dilapidations (b).

1. The plaintiff is the new incumbent of the benefice of A., and the defendant is the late incumbent of the said benefice.

(a) By the 34 & 35 Vict. c. 44, clergymen permanently incapacitated by illness may resign their benefices, and a pension not exceeding one-third of the annual value of the benefices resigned may be awarded to them; and by sect. 10, "The pension so allowed shall be a charge upon the revenues of the benefice, and shall be recoverable as a debt at law or in equity from the incumbent of the said benefice by the retired clerk, his executors, administrators, or assigns, but such pension shall not be transferable at law or equity." In *Gathercole v. Smith* (7 Q. B. D. 626; 50 L. J. Q. B. 681), it was held by the Court of Appeal that a set-off, or counter-claim, cannot be pleaded to an action brought under this statute for arrears of pension.

When clergymen may get a pension on resignation.

(b) By the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), it is provided that no sum shall be recoverable for dilapidations in respect of any benefice which becomes vacant after the commencement of the Act, and to which the Act applies, unless the claim be founded upon an order under the Act. (Sect. 53.) Under the Act diocesan surveyors are appointed: and if an incumbent makes such repairs as they require, he is relieved from all further liability for five years, unless in case of wilful waste, or damage by fire against which the incumbent has failed to insure. (Sects. 46, 47.) The whole expense of the repairs is cast upon the incumbent, who, however, may borrow the money from Queen Anne's Bounty, and charge the sum on the benefice. When the benefice becomes vacant, unless the late incumbent, or his representatives, are relieved from liability under the Act by having made such repairs as the surveyor directed within five years, it is the duty of the bishop to direct the surveyor to inspect the rectory buildings, &c., and report what sum is required to make good the dilapidations. (Sect. 29.) The surveyor's report will set out what works are necessary, and what sum will be required. A copy of such report must be sent to the present and the late incumbent, and they are entitled to state their objections to it to the bishop. Finally, the bishop shall make an order stating the repairs

Liability for dilapidations.

2. The plaintiff's claim is, as the incumbent of the said benefice, for £150, being the cost of the necessary repairs to the buildings of such benefice which the defendant was directed to pay to the plaintiff by the order of the Bishop of — duly made in pursuance of the Act in that behalf.

The plaintiff claims £150.

Defence.

1. Within five years of the avoidance of the said benefice the buildings thereof were, at the defendant's request, duly inspected by the diocesan surveyor, who reported what repairs were necessary to be done.

2. The said repairs were forthwith carried out to the satisfaction of the said diocesan surveyor, who gave a certificate of their completion.

Commission (a).

Claim in an Action for Commission by a House Agent.

The plaintiff's claim is for commission for work done as a house-broker for the defendant at his request.

and their cost, and, by sect. 36, "The sum stated in the order as to the cost of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law and in equity." The money, when recovered by the new incumbent, shall be paid over to the Governors of Queen Anne's Bounty, and it will ultimately be applied to the reparation of the buildings.

All agents
entitled to
commis-
sion.

(a) In the ordinary course of commercial dealings, a compensation is impliedly understood to be due to every person who undertakes the duties and services of an agent, the amount, in the absence of agreement, being governed by the usage of trade; but where there is an agreement as to the amount and mode of payment, that cannot be departed from. Thus, a commission agent employed to negotiate a sale upon the terms that he is to be paid a commission on the amount of purchase-money, or on the happening of a certain event, will not be entitled to any commission until the purchase-money has been received, or the event has happened, unless there has been fraudulent delay or wilful neglect on the part of the employer. (*Bull v. Price*, 5 M. & P. 2; 7 Bing. 237; *Alder v. Boyle*, 4 C. B. 635.) So if the commission is to be paid on the "net proceeds," it is payable only on the actual sum which reaches the pocket of the principal, after deducting all charges and expenses. (*Crane v. Horsfall*, 1 Exch. 519.) Shipbrokers are said to be usually entitled by the custom and usage of trade to 5 per cent. commission upon the freight payable upon charter-parties obtained by their exertions; and the right to the commission does not depend upon the fact of the ship's earning

Ship-
broker's
commis-
sion.

Particulars:—

1880. 5 per cent. upon £200, one year's			
1st Jan. rent of 5, Moore Street,			
Chelsea, let by plaintiff . . .	£10	0	0
3rd Feb. 5 per cent. upon £300, one			
year's rent of Havre House,			
let by plaintiff	15	0	0
1st Jan. Paid for advertisements . . .	3	0	0
to			
3rd Feb.	£28	0	0

The plaintiff claims £28.

freight, and the claim is not liable to be cut down by the loss of the vessel or her failure to get a cargo. (*Hill v. Kitching*, 3 C. B. 306. See also *Burnett v. Bouch*, 9 C. & P. 624; *Boulton v. Jones*, 2 H. & N. 564.) In *Lockwood v. Levick* (8 C. B. N. S. 603; 29 L. J. C. P. 340) it was decided that where a commission agent employed by a manufacturer to obtain orders is to receive a commission "on all goods bought" by persons from whom he obtains orders, the commission is earned as soon as a valid bargain of purchase and sale has been made between the manufacturer and the purchaser introduced by such agent, whether the goods are at the time in existence or not, and whether the contract is or is not eventually carried out, and whether it turns out a bad bargain to the principal or a good one.

So where the defendant contracted with the plaintiff "In the event of your procuring me the sum of £2,000 I agree to pay you a commission of 2½ per cent. on the sum received," it was held by the Court of Appeal that when the plaintiff procured a person willing to lend the money upon proper security being given, he was entitled to his commission, though the negotiation ultimately went off from the defendant not being able to offer proper security. (*Fisher v. Drewett*, 48 L. J. Ex. 32.) It sometimes happens that a man having a house to let or sell places it in the hands of several house-agents, with instructions to secure a tenant or purchaser—in such a case the successful agent is alone entitled to commission, unless instructions have been given to the other house-agents to advertise the house, or render some special service entitling them by the custom of the trade to some remuneration. (*Prickett v. Badger*, 1 C. B. N. S. 296; 26 L. J. C. P. 33.) But if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to his commission, although the actual sale was not effected by him. (*Green v. Bartlett*, 14 C. B. N. S. 685; and to the same effect see the recent case of *Wilkinson v. Alston*, 48 L. J. 733.)

House-agent's commission.

The defendants contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Railway Company. The plaintiff, at the time of such contract being made, was in a position of trust in relation to the railway company, having been employed by them as an engineer to advise them as to the repairs; and the contract between defendant's and plaintiff was made in part consideration of a promise that the plaintiff would use his influence with the railway company to induce them to accept the defendant's tender for the repair of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not, in consequence thereof, given less

Defence.

The defendant says :

1. He never employed or requested the plaintiff to let either of the premises mentioned in the claim.
2. Neither of them was let by or through the plaintiff.
3. In the alternative, the commission the defendant agreed to pay was $2\frac{1}{2}$ per cent. and not 5.
4. The defendant brings into Court the sum of £10 10s., and says that the same is sufficient to satisfy the plaintiff's claim herein.

Claim by several Plaintiffs in the alternative for Commission on Sale of a Steamer (a).

1. In the month of May, 1876, the defendant agreed with the plaintiffs that in consideration the plaintiffs would introduce to the defendant a purchaser for a steamship belonging to him called the "Amboto," the defendant would pay to the plaintiffs commission at the rate of $2\frac{1}{2}$ per cent. upon the purchase-money of the said vessel.

2. In the said month of May, the plaintiffs introduced to the defendant certain persons trading as the Inman Steamship

beneficial advice to the company as to the defendants' tender than he would otherwise have done. It was held that the plaintiff could not maintain an action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt. (*Harrington v. The Victoria Graving Dock Co.*, 3 Q. B. Div. 549; also *Smith v. Sorby*, 3 Q. B. Div. 552.)

How
agent's
right to
commis-
sion af-
fected
by
death of
principal.

An authority to sell or let upon certain terms and for a certain commission is revoked by the death of the principal before the authority has been acted upon and executed, so that if the agent sells after the death of his principal, he will not be entitled to the commission unless the personal representative has renewed the contract. (*Campanari v. Woodburn*, 15 C. B. 400; 24 L. J. C. P. 13.) The right of the agent to be reimbursed upon the revocation of his authority, otherwise than by death, depends upon the special terms of the agreement and the usage of trade. (See on this subject, *Simpson v. Lamb*, 17 C. B. 616.) Where a house-agent, employed to sell at a given price, succeeds in finding a purchaser but the principal then declines to sell, the agent is entitled to sue for a reasonable remuneration for his services. For all work done by the agent in discharge of his business as agent, he is paid by his commission, and can make no extra charge; but for work done by order of his principal beyond his duty as agent, he is entitled to make an extra charge. (*Marshall v. Parsons*, 9 C. & P. 658.)

(a) By Order XVI. r. 1 several plaintiffs may in the same action claim together in the alternative.

Company, Limited, who subsequently purchased the "Amboto" at the price of £19,000.

3. The plaintiffs will, in the alternative, contend that the defendant made the aforesaid agreement with some or one of them, and that he is now liable to pay to some or one of them the sum of £475 commission under the said agreement.

The plaintiffs, or in the alternative some or one of them, claim or claims £475, with interest until judgment.

3. *Claim for Commission for Finding a Charterer.*

1. In December, 1876, the plaintiffs were employed by the defendant to find a charterer for the defendant's ship the "H." from India, upon the terms that the defendant should pay the plaintiffs a commission of $1\frac{1}{4}$ per cent. on the freight that might be obtained.

2. The plaintiffs found a charterer for the said ship, and the defendants earned £5754 freight under such charter-party.

The plaintiffs claim £——.

4. *Claim for Commission by an Auctioneer.*

The plaintiff's claim is for commission and expenses in connection with a sale of the defendant's household furniture and effects at 3, King Street, Walworth, which the plaintiff, as an auctioneer, conducted at the defendant's request on the 3rd of May, 1881.

Particulars of the plaintiff's claim :—

10 per cent. commission upon £400 realised by the said sale . . .	£40	0	0
Advertisements of the said sale in newspapers	2	0	0
Bills and posting	3	0	0

The plaintiff claims £45.

Defence and Counter-claim.

Defence.

1. It was verbally agreed between the plaintiff and the defendant that the plaintiff should only charge a commission of 5 per cent. upon the sum realised by the said sale.

2. As to the claim for advertisements and bills the defendant at the time when he instructed the plaintiff to conduct the said

sale paid to him the sum of £5, which it was agreed was to cover the cost of all disbursements and expenses in connection with the same.

Counter-claim.

3. The defendant says that he has suffered damage by various breaches by the plaintiff of his duty as an auctioneer in regard to the said sale.

Particulars of the said breaches are as follows :—

The plaintiff failed to properly advertise and announce the sale. He attended the said sale, and attempted to conduct it in a state of intoxication, and he sold many articles for less than the reserve price the defendant had placed on them.

The defendant counter-claims £150 damages.

Common Carriers (a).

1. Action by Consignee against Carrier for Delay in Delivery.

1. On the 3rd of August, 1880, John Smith, of Grimsby, delivered to the defendants, as common carriers, six hampers of cod, consigned to the plaintiff in London.

Who are
common
carriers.

(a) COMMON CARRIERS BY LAND.—*Who are common carriers.*—A common carrier is a person who undertakes to transport from place to place for hire the goods of those who think fit to employ him. The owners of coaches, and of carts and waggons carrying for hire between fixed termini, are common carriers. Railway, canal, and navigation companies may become common carriers (8 & 9 Vict. c. 20, ss. 86, 69; 8 & 9 Vict. c. 42, ss. 5, 6); and such companies are generally common carriers, but only as to such things as they publicly profess to carry. (*Johnson v. Midland Railway Company*, 4 Ex. 367.) The owner of a lighter, hoy, or flat which he uses regularly for carrying therein for hire from place to place on the banks of the Mersey the goods of such persons as choose to employ him, though not plying regularly between fixed termini, is a common carrier. (*Liver Alkali Co. v. Johnson*, L. R. 7 Ex. 267; 9 Ex. 338; 41 L. J. Ex. 110; 43 L. J. Ex. 216; 31 L. T. 95.)

Common
carriers
bound to
carry all
goods
offered to
them.

Bound to
carry
within a
reasonable
time.

Liabilities at common law.—Common carriers are bound to receive and carry all goods offered to them for which the person requiring them to be carried is ready and offers to pay reasonable hire. (*Pickford v. Grand Junction Rail. Co.*, 8 M. & W. 372; *Garton v. Bristol and Exeter Rail. Co.*, 30 L. J. Q. B. 273.) And they are bound to complete carrying within a reasonable time, having regard to all the circumstances, but they are not responsible for the consequences of delay arising from causes beyond their own control (*Taylor v. Great Northern Rail. Co.*, L. R. 1 C. P. 385); and provided they carry by a reasonable and usual route, they are not bound to carry by the shortest route, even though enabled by statute to charge a mileage rate for carriage. (*Myers v. London and South-Western Rail. Co.*, L. R. 5 C. P. 1.) Common carriers are not bound to take extraordinary measures, if the road is obstructed by snow, for accelerating the journey, though the delay may be injurious

2. The defendants failed to deliver the said six hampers of cod to the plaintiff in a reasonable time, but delivered them

to the goods or their owners. (*Bridden v. Great Northern Rail. Co.*, 28 L. J. Ex. 51.)

Common carriers are, by the common law, insurers of the goods they carry against all accidents except the act of God (i.e. things which could not happen by the intervention of man, as storms, lightning, and tempest), and the Queen's enemies. In order to come within the exception of loss by the act of God, the loss need not have been caused directly and exclusively by such a direct, violent, sudden, and irresistible act of nature as the carrier could not by any amount of ability foresee or resist, so as to prevent its effect. A loss is a loss by the act of God if occasioned by the elementary forces of nature, unconnected with the agency of man or other cause. If the loss is occasioned partly by the act of God as above defined and partly by some other cause which, if it had been the sole cause of the loss, would have furnished a defence, the carrier will be entitled to immunity in respect of such loss, if he can show that it could not have been prevented by any amount of forethought and care reasonably required of him. (*Nugent v. Smith*, 1 C. P. Div. 425; 45 L. J. C. P. 697, App.)

They are insurers of the goods they carry.

What is "the act of God."

Carriers of live stock are not liable for injuries caused by the inherent vice of an animal; they are exempted from liability in this respect if they provide for the carriage a truck that is reasonably fit for the purpose. (*Blower v. Great Western Rail. Co.*, L. R. 7 C. P. 655; 41 L. J. C. P. 2, explaining *Carr v. Lancashire & Yorkshire Rail. Co.*, 21 L. J. Ex. 263; and see *Richardson v. North Eastern Rail. Co.*, L. R. 7 C. P. 75; and *Gill v. Manchester, &c., Rail. Co.*, L. R. 8 Q. B. D. 186; 42 L. J. Q. B. 89.) Nor are carriers liable for injuries to goods arising through ordinary wear and tear, or friction during the journey, or for the natural decay of perishable goods. (*Story*, Bailments, cited with approval, in *Blower v. Great Western Rail. Co.*, *supra*.)

Injury through vice of animal carried.

Wear and tear, &c.

Common carriers from a place without to a place without the realm are subject to the same liabilities as those within the realm. (*Crouch v. London & North Western Rail. Co.*, 23 L. J. C. P. 73.)

Carriers may generally limit their business to certain goods, but must do so by a public profession of what goods they are willing to carry; in such cases they are not bound to carry any others. (*Johnson v. Midland Rail. Co.*, 4 Ex. 367; *Oslade v. North Eastern Rail. Co.*, 26 L. J. C. P. 129.)

They may limit or modify their common law liabilities by contract, where persons are willing to enter into such stipulations with them. Thus a carrier of furniture for hire who stipulated with the customer that he should only be liable for breakages not exceeding £5 for any article, was held not liable for the destruction during transit by fire without negligence on his part of the whole of the goods received by him to be carried. (*Seafie v. Tarrant*, 44 L. J. Ex. 234, Ex. Ch.; L. R. 10 Exch. 359.)

Carriers may limit their liability by special contract.

Statutory modification of liability.—But railway and canal companies can only limit their liability by contracts which are signed and which in the opinion of the Court are reasonable. The liability of carriers has been modified by the following enactments, of which it is proposed to give a summary, adding after each the most important modern decisions:—

Statutory modification of liability.

11 Geo. 4 & 1 Will. 4, c. 68 (Carriers Act), explained by 28 & 29 Vict. c. 94.

17 & 18 Vict. c. 31 (Railway and Canal Traffic Act).

31 & 32 Vict. c. 119 (Regulation of Railways Act, 1868.)

34 & 35 Vict. c. 78.

two days after the time when they ought to have been delivered and when they had become stale and valueless.

Particulars of damage :—

Six hampers of cod at £5 per hamper . £30 0 0

The plaintiff claims £30.

The 11 Geo. 4 & 1 Will. 4, c. 68, provides :—

Carrier by land not liable for loss, &c., of specified articles if above £10 in value, unless value declared at time of delivery to carrier.

Sect. 1. That no common carrier *by land* for hire shall be liable for the loss of or injury to any articles of the descriptions following ; (that is to say.)—gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace (not machine-made, 28 & 29 Vict. c. 94), or any of them,—contained in any parcel which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger, in any mail or stage coach or other public conveyance, when the value of such articles contained in such parcel or package shall exceed £10, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such common carrier, or to his book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger, the value and nature of such articles shall have been declared by the person sending or delivering the same, and the increased charge hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Carrier may demand increased charge.

Sect. 2 authorises the demand of an increased rate of charge for such articles, notified by a notice publicly affixed in the carrier's office, which all persons sending parcels are to be bound by without further proof of the same having come to their knowledge.

To give a receipt for increased freight.

Sect. 3 provides "That when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty, and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the . . . carrier . . . shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

General notices limiting liability invalid.

By sect. 4, no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such public common carriers in respect of any articles or goods to be carried by them ; but all such common carriers shall be liable, as at the common law, to answer for the loss of or injury to any articles and goods in respect whereof they may not be entitled to the benefit of the Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

By sect. 5, for the purposes of the Act, every office, warehouse, or n-

Defence.

1. The said six hampers of cod were delivered to the defendants and received by them under a special contract in

ceiving house, used or appointed by such common carrier for receiving parcels, shall be taken to be the receiving house or office of such carrier; and any one or more carriers may be sued without joining their co-proprietors.

By sect. 6, nothing in the Act shall be construed to annul or affect any special contract between such common carrier and any other parties for the conveyance of goods and merchandises.

By sect. 7, a person who has insured, as above, may recover back the extra charge as well as the value of the goods lost or damaged.

By sect. 8, nothing in the Act shall be deemed to protect any common carrier for hire from liability to answer for loss or injury to any goods whatsoever arising from the *felonious acts* of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, &c., from liability for any loss or injury occasioned by his own personal neglect or misconduct.

By sect. 9, common carriers shall be liable to pay only the actual value, as proved, not exceeding the declared value, together with the increased charges paid by the owner.

Contracts to carry partly by land and partly by sea are divisible, and as to the land journey, the carrier is within the protection of the above Act. (*Le Conteur v. London and South-Western Rail. Co.*, L. R. 1 Q. B. 54; *Bazendale v. Great Eastern Rail. Co.*, L. R. 4 Q. B. 244, Ex. Ch.)

It was held that a packed wagon sent for carriage by the defendants is a parcel or package under the 1st section of the above Act. (*Whaite v. Lancashire and Yorkshire Rail. Co.*, L. R. 9 Ex. 67.) So the frame of a picture as being accessory to the picture itself. (*Henderson v. London and South-Western Rail. Co.*, L. R. 5 Ex. 90.) Where a packing case contains articles some within the statute and some not, the value of the case and of the articles not within the statute may be recovered, though the statute has not been complied with as regards the articles within the statute. (*Treadwin v. Great Eastern Rail. Co.*, L. R. 3 C. P. 308.) Where the plaintiff sent a valuable picture by railway and declared its nature and value at the time of its delivery for carriage, and the company did not demand any increased rate to which they were entitled under section 2 of the above Act, and only the ordinary charge was paid, the carrier was held not protected by the statute for an injury to the picture during the journey. (*Behrens v. Great Northern Rail. Co.*, 7 H. & N. 950, 958; 31 L. J. Ex. 299, 300.) The word "paintings" in the Act means articles of artistic value as paintings; and models and working designs for carpets and rugs, painted by hand and skilfully designed, but of value in the carpet trade only, are not within the class designated. (*Woodward v. The London and North-Western Rail. Co.*, 3 Ex. D. 121; 47 L. J. Ex. 263.)

A carrier is not deprived of the protection afforded by the Carriers Act merely by the fact that the loss of goods is temporary, and not permanent, nor can the owner of goods which ought to have been, but which were not, declared pursuant to the statute, recover damages for the consequences of the loss of them, as distinguished from the loss itself. (*Millen v. Brasch*, 10 Q. B. Div. 142, C. A.)

Since the passing of this Act, if articles mentioned in section 1 are sent without declaring their value, carriers who have complied with the requirements of the Act are not liable for a loss even though occasioned

Special contracts not affected.

Act not to protect carrier against the felonious act of his servant.

What articles are and what are not within the Act.

Carriers not protected where delay ground of action.

writing, made between the defendants and the said John Smith on the plaintiff's behalf, by which it was agreed, in con-

by gross negligence on the part of their servants, or *semble* of themselves. (*Hinton v. Debbin*, 2 Q. B. 646.) Wilful misfeasance would however render them liable (*ibid.*).

Evidence of loss by felonious act.

In an action against carriers for loss, where the value has not been declared, on the ground that the goods were stolen by the carrier's servants, it is not necessary that the plaintiff should prove that any particular servant had stolen them. (*Vaughton v. London & North-Western Rail. Co.*, L. R. 9 Ex. 93; see also *Kirkcaldy Brewery Co. v. Furness Rail. Co.*, L. R. 9 Q. B. 468; and *Way v. The Great Eastern Rail. Co.*, 1 Q. B. D. 692; 45 Q. B. 574.)

Railway companies, &c., not liable beyond specified sums for certain animals unless value declared and increased charge paid.

Railway and Canal Traffic Act, 17 & 18 Vict. c. 31.—The 7th section provides that every railway or canal company shall be liable for loss of or injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; and every such notice, condition, or declaration is declared to be null and void. Provided that nothing therein shall be construed to prevent such companies from making such conditions with respect to receiving, forwarding, and delivering such animals, articles, &c., as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried, to be just and reasonable. The section further provides certain limits to damages recoverable for loss or injury to any of such animals (namely, a horse, £50; neat cattle, £15 each; sheep and pigs, £2 each), unless the person sending or delivering the same to the company shall, at the time of delivery, have declared them to be of higher value, in which case the company may charge a reasonable percentage on the excess of value above the limited sum, to be paid in addition to the ordinary charge, such percentage to be notified in the manner prescribed by the Carriers Act (s. 2), and to be binding on the company as therein mentioned. Proof of the value and amount of injury to lie on the claimant. No special contract between the company and the other parties respecting the receiving, forwarding, or delivering of any goods, &c., shall be binding on or affect such party, unless it be signed by him or the person delivering the goods for carriage. Nothing in the Act is to alter or affect the rights or liabilities of the company under the Carriers' Act, with respect to the articles mentioned in that Act.

No special contract binding unless signed by the party.

It has been held that this section only applies to carriage of goods over lines which the company are working themselves, and not to contracts by the company to carry over other lines. (*Zunn v. South-Eastern Rail. Co.*, L. R. 4 Q. B. 539.) But where the company contract to carry over their own as well as other lines, they must prove that the loss did not occur on their line in order to avail themselves of a condition of non-liability. (*Kent v. Midland Rail. Co.*, L. R. 10 Q. B. 1.)

Test for determining reasonableness of condition.

The question of what conditions limiting liability will be considered by the Court fair and reasonable has frequently arisen. In *Park v. Staffordshire Rail. Co.*, 10 H. L. Cas. 473; 32 L. J. Q. B. 241, all the cases on the subject up to that time are elaborately examined; and in the case of *Brown v. The Manchester, Sheffield & Lincolnshire Railway Co.*, in the House of Lords, in the present year, the authorities were again reviewed. In that case the plaintiff, a fish merchant, signed a contract by which, in consideration of the defendants carrying his fish at a rate one-fifth less than the ordinary rate, he agreed to free the defendants from "all liability for loss or damage by delay in transit or

sideration of a lower rate of freight, that the said cod should be carried at owner's risk, and that the defendants should not be liable for any delay in the delivery of the same.

from whatever cause arising." It was held by the Court of Appeal (10 Q. B. Div. 250), overruling the Q. B., that, as by the exigencies of trade the plaintiff, in order to compete with others in the trade, was obliged to send his fish at the lower rates offered by the defendants, he practically had no option, and therefore the contract was not just or reasonable. This decision was overruled in the Lords. (8 App. Cases, 703.)

Passengers' luggage is within section 7 of the Act, and therefore railway companies are liable for loss of or injury to such luggage occasioned by their neglect, notwithstanding any notice given by them. (*Cohen v. South-Eastern Rail. Co.*, 2 Ex. Div. 253; 46 L. J. Ex. 417; overruling *Stewart v. London & North-Western Rail. Co.*, 33 L. J. Ex. 199.)

Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119).—The Act applies to the owners, whether companies, or individuals, of the whole or any part of a railway or tramway, whether worked by steam or otherwise. (Sect. 2.)

By sect. 14 where a company, by through booking, contracts to carry any animals, luggage, or goods from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, &c., by sea, from the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, &c., be valid as part of the contract between the consignor of such animals, &c., and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. For the purposes of this section the word "company" includes the owners, lessees, or managers of any canal or other inland navigation.

The 34 & 35 Vict. c. 78, enacts (sect. 12), that where railway companies under contract to carry passengers or goods by sea procure the same to be carried in a vessel not belonging to them, they are liable for loss or damage to the same extent as though the vessel belonged to them.

What is sufficient delivery to carrier.—In the case of shipowners, a delivery of goods at the wharf or quay to some person accredited for the purpose, binds the shipowner. (*British Columbia, &c., Co. v. Nettleship*, L. R. 3 C. P. 499.) A delivery to the driver of a stage-coach is sufficient to make the proprietor liable. Where the ordinary course of business at a railway office was to accept goods with a special limitation of liability in writing, and this was known to the plaintiff, who nevertheless caused his goods to be left with a railway porter at the station without complying with the regular course, and they were lost, it was held that the company was not liable *as on contract*, the delivery not being in due course, and there being no evidence that the porter had or professed to have power to contract with the plaintiff otherwise than in the ordinary course. (*Slim v. Great Northern Rail. Co.*, 23 L. J. C. P. 166.)

Non-delivery by carrier.—In the absence of any express agreement or usage, carriers by land are bound to deliver to or at the residence of the consignee; and with regard to carriers by sea, it seems to be sufficient if the captain deposits the goods in some place of safety, and gives notice to the consignee. (*Hyde v. Trent & Mersey Navigation Co.*, L. R.

If journey partly by sea, a notice exempting from liability for injury through fire, &c., at sea, if published in the booking-office, is binding.

Decisions as to what amounts to delivery to carrier.

Where the carrier should deliver.

2. The defendants deny that they failed to deliver the said cod in a reasonable time, and they further deny that when it was delivered it had become stale and valueless.

397.) Though the consignor directs goods to be delivered at a particular place, the carrier may deliver them at another place agreed on between him and the consignee. (*London & North-Western Rail. Co. v. Bartlett*, 31 L. J. Ex. 92; and *Cork Distilleries Co. v. Great Southern & Western Rail. Co.*, L. R. 7 H. L. 269.) It was, however, intimated in the last case that if there had been a special contract between the consignor and the carrier, it would have been different. If the carrier delivers at the place directed in accordance with the ordinary usage, he is not liable, though he delivers them to a person the consignor did not name. (*McAra v. McIvor*, L. R. 6 Ex. 36.)

Carrier
not liable
as such for
safety of
goods after
constructive
deli-
very.

Where there has been a delivery, actual or constructive, though the goods remain on the carrier's premises, he is no longer liable as a carrier, but only as a warehouseman, or on any special terms he may think proper to impose on the customer, and the contract is not affected by any of the statutes relating to carriers. (*Shepherd v. Bristol & Exeter Rail. Co.*, L. R. 3 Ex. 189; *Chapman v. The Great Western Rail. Co.*, 5 Q. B. Div. 278; 49 L. J. Q. B. 420.) If at the consignee's address there is a refusal to accept them, the carrier becomes an involuntary bailee of them, and is only bound to act with reasonable care with reference to their custody. (*Heugh v. London & North-Western Rail. Co.*, L. R. 5 Ex. 51.) And if such refusal is authorised by the consignee, the carrier may recover from him the expenses reasonably incurred in taking care of the goods. (*Great Northern Rail. Co. v. Swaffield*, L. R. 9 Ex. 132.)

Measure of
damage
where
goods
lost or de-
stroyed.

Measure of damages.—The plaintiff is entitled where goods are lost or destroyed to recover their market value at the place and time at which they ought to have been delivered, as distinguished from that at which they were delivered to the carrier; if there is no market for the sale of such goods at that place, the jury must ascertain their value by taking their price at the place of manufacture, together with the cost of carriage, and allowing a reasonable sum for importer's profits. (*Rice v. Baerendale*, 30 L. J. Ex. 371 (H. of L.); *O'Hanlan v. Great Western Rail. Co.*, 34 L. J. Q. B. 154.)

Measure of
damage
where
goods
delayed.

In cases of delay in the transmission, the plaintiff may recover the difference between the market price of goods on the day when they ought to have been delivered, and the price when they were available for sale owing to delay and damage caused by the defendants. (*Collard v. South-Eastern Rail. Co.*, 7 H. & N. 79; 30 L. J. Ex. 393.) Where owing to the delay of a month in the delivery of cloth which the plaintiff wanted immediately to make into caps, he lost the season, it was held that he could not recover the loss of profits he would have made on the caps, but that he could recover the amount of depreciation in the value of the cloth on account of the lapse of the season. (*Wilson v. Lancashire Rail. Co.*, 30 L. J. C. P. 232; and see *Great Western Rail. Co. v. Redmayne*, L. R. 1 C. P. 329.)

When
value of
contract
lost by
negligence
of carrier
can be
recovered.

Notice of prospective profit or loss.—It is necessary to enable a consignor to recover for the loss of a beneficial sub-contract or other calculated source of profit, that the carrier should have notice of the special terms of such contract or source of profit at the time the goods are delivered to him for carriage (*Horne v. Midland Rail. Co.*, L. R. 7 C. P. 583, affirmed Ex. Ch. L. R. 8 C. P. 131), and *semble* a mere notice of a sub-contract will not be sufficient unless so given as to make it a term in the contract with the carrier that the latter will on breach be liable for loss of contract. (*Ibid.* 139, 141, 145.) The same rule holds with regard to other losses from missing reasonably anticipated sources of profit, as

Reply.

1. The plaintiff joins issue upon the defence.
2. As to the 1st paragraph of the defence, the plaintiff says

for instance the loss of the hire of goods sent for hire. (*Hales v. London & North-Western Rail. Co.*, 32 L. J. Q. B. 292. But see *Simpson v. London & North-Western Rail. Co.*, 45 L. J. Q. B. 182; 1 Q. B. D. 274.)

Remoteness of damage.—Where on account of loss or non-delivery, delay or refusal to carry, a carrier who uses the railway for the transmission of his parcels is injured in his business as a carrier, he cannot recover for such injury. (*Crouch v. Great Northern Rail. Co.*, 25 L. J. Ex. 137.) But where he is compelled to pay damages occasioned by such loss or delay, he will have an action over against the carrier employed by him. However, where on such a carrier being sued he gave notice to the carrier by whose default a loss was occasioned, and the latter declined to interfere, the former was held not entitled to recover his costs as well as the damages in such action. (*Barendale v. London, Chatham, & Dover Rail. Co.*, L. R. 10 Ex. 35 (Ex. Ch.)) A commercial traveller was put to hotel expenses in waiting the arrival of goods which were improperly delayed in transit: it was held a claim for such expenses against the carrier was too remote. (*Woodger v. Great Western Rail. Co.*, L. R. 2 C. P. 318.)

What damage cannot be recovered. Remote-ness.

Who entitled to sue.—The person in whom the property was vested when it was lost or damaged is the person entitled to sue. As the delivery of goods to the carrier usually vests the property therein in the consignee, the latter is the person who generally speaking can sue. (*Dunlop v. Lambert*, 6 Cl. & F. 600.) But where there is a special contract between consignor and carrier, or the property has not vested in the consignee, as where goods are sent on approval, the consignor should sue. (*Ib.*; *Drain v. Shepherd*, 1 M. & Rob. 223.) If, however, there is a contract between the consignee and carrier, under which the former is liable for freight, he may sue. (*Mead v. South-Eastern Rail. Co.*, 18 W. R. 735.)

Consignee generally the party to sue.— Exceptions.

A special property of the sender in a thing lost enables him to sue. (*Freeman v. Birch*, 3 Q. B. 492, n.) Where separate property of two persons is sent in one box or parcel by a joint agent of both they may join in an action for the loss. (*Metcalf v. London & Brighton Rail. Co.*, 27 L. J. C. P. 333.) If a master pays for his servant's ticket, and the luggage of the latter is lost or injured, the servant may sue for the loss or injury in his own name, the tort being independent of contract. (*Martin v. Great Indian Peninsular Rail. Co.*, L. R. 3 Ex. 9; *Austin v. Great Western Rail. Co.*, L. R. 2 Q. B. 442.) See *post* as to injury to person by negligence of carriers.

Special property entitles sender to sue.

Acts or default of consignor.—If the plaintiff has not properly packed goods that are brittle and they are broken or injured he cannot recover from the carrier if the latter has used due care. It has been thought that where the foundation of the action is negligence and non-performance of duty, so as to be founded on tort rather than on contract, it would be a defence that the loss was owing to the plaintiff's own default. (*Burrows v. March Gas Co.*, L. R. 5 Ex. 67.) Where it was proved that the defendant's cart was unfit to carry the plaintiff's goods and that they were improperly packed, evidence would be admissible to show that the plaintiff himself packed them and represented them as under their real weight, thus causing the defendant to put them in a cart which was too slight or small for them. (*Webb v. Page*, 6 M. & G. 196.)

Consignor's own default contributing to loss.

Fraud.—If the consignor fraudulently concealed the value and risk

further that he will contend that if any such contract was made the same was bad in law as being unreasonable.

Fraudulent concealment of risk.

from the carrier in order to be charged at a lower rate for carriage, he cannot recover on account of a loss occasioned through such concealment. (*M'Caner v. London & North-Western Rail. Co.*, 31 L. J. Ex. 65.) If a person intentionally makes false answers to the carrier's inquiries, the contract is void on account of fraud. (*Walker v. Jackson*, 10 M. & W. 188, 189.) It was formerly necessary to plead such a defence specially; now it is equally essential to set forth the defence with sufficient explicitness.

Shipowners and master of ship liable as insurers.

How this liability is restricted.

COMMON CARRIERS BY SEA.—The owners of a general ship and the master were liable at Common Law as common carriers, that is to say, they were bound to redeliver the goods delivered into their charge, the act of God and the Queen's enemies only excepted. But this extensive liability is limited: (1) By the bill of lading which the master gives to the consignor of the goods and which evidences the contract between the parties; and (2) by the operation of several statutes. It is usual for the bill of lading to contain an exception from liability for "accidents or damage of the seas;" but this exception does not protect the shipowner or the master from liability for loss or damage caused by the negligence of the crew. (*Grill v. General Iron Screw Colliery Co.*, L. R. 3 C. P. 476, Ex. Ch.) So an exception for "breakage, leakage, or damage," does not protect the shipowners from liability for damage accruing through the negligence of their servants. (*Martin v. Great Indian Peninsular Rail. Co.*, L. R. 3 Ex. 9; *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 14.) But it is said that the effect of such exceptions is to shift the onus of proof, and oblige the plaintiff to prove affirmatively the negligence of the defendant's servants. (*The Helene*, B. & L. 429, P. C.; L. J. 35 P. C. 63.)

Limited with respect to accidental fires on shipboard and robbery of certain articles.

Coming next to the statutory limitations of the shipowner's liability, there is the 17 & 18 Vict. c. 104, by which it is provided (sect. 503) that no owner (it must be noted nothing is said about the master, and he does not seem to get the benefit of this statute) of any sea-going ship shall be liable to make good to any extent whatever any loss or damage that may happen *without his actual fault or privity* of or to goods or things taken on board by reason of fire happening on board, or of or to any gold, silver, diamonds, watches, jewels, or precious stones on board by reason of robbery or embezzlement, unless the shipper shall at the time of shipping the same have inserted in his bill of lading, or otherwise have declared in writing to the master or shipowner their true nature and value. It will be noted that this statute protects a shipowner entirely for loss by fire not occasioned by his personal default occurring to goods generally; but that the exemption for liability resulting from robbery of goods is strictly confined to certain classes of valuables specified in the Act.

Shipowner not liable beyond so much a ton of the ship's tonnage.

The next statute is the 25 & 26 Vict. c. 65, which by its 54th section enacts that the owners (no mention of the master) of any ship, whether British or foreign, shall not in cases which occur *without their fault or privity* be answerable in damages in respect of loss or damage to any goods, merchandise or other things on board, to an amount exceeding £8 for each ton of the ship's tonnage: but it has been decided that the section does not extend to protect the shipowner for damage caused by delay. (*London & South-Western Rail. Co. v. James*, L. R. 8 Ch. 241.)

Neither shipowner nor master liable for

A third statutory exemption is found in the 388th section of the 17 & 18 Vict. c. 104, which provides that neither owner nor master is liable for loss or damage occasioned by the fault or incapacity of a qualified pilot, where the employment of one is compulsory. Except, however,

2. Action by Consignee for Value of Goods not delivered.

1. On the 1st of November, 1879, three trunks containing wearing apparel were received by the defendants at Plymouth, as common carriers, consigned to the plaintiff at Birmingham.

in cases coming within one or other of these exceptions, or where the bill of lading limits the liability of the shipowner and master of a general ship, the latter are both liable to the consignor or consignee of the goods as insurers of the same, and bound to deliver safely unless the loss is occasioned by the act of God or the Queen's enemies.

default of pilot.

CARRIERS OF PERSONS—ACTIONS AGAINST.]—The liability of passenger carriers is more limited than that of carriers of goods. They are not insurers of the persons of the passengers, and are only liable for want of due care. (*Readhead v. Midland Rail. Co.*, L. R. 4 Q. B. 379, Ex. Ch.; 38 L. J. Q. B. 169; 2 B. & S. 519.) They are not liable for accidents caused by hidden defects in their carriages which could not be detected by ordinary care and skill previous to the happening of the accident. (*Readhead v. Midland Rail. Co.*, *supra.*) But they are liable for defects in their carriages caused by the negligence of their sub-contractors. (*Frances v. Cockrell*, L. R. 5 Q. B. 184; and Ex. Ch. *Ibid.* 501.)

Liability of carrier of passengers less than that of carrier of goods.

If a railway company issues a ticket for a journey extending beyond its own line, that is evidence of a contract to carry over the other line as well as their own, and their liability to the passengers in such cases is not affected if the injury is caused on the line not belonging to them. (*Buxton v. North-Eastern Rail. Co.*, L. R. 3 Q. B. 549; *Thomas v. Rhymney Rail. Co.*, L. R. 5 Q. B. 226; *S. C.*, Ex. Ch. L. R. 6 Q. B. 266.) And in *Foulkes v. The Metropolitan District Rail. Co.* (5 C. P. D. 157; 49 L. J. C. P. 361), it was decided that where the ticket is taken at the station of A railway, and the accident happens on B railway, the latter, apart from any question of breach of contract, is liable in tort. To the same effect is *Hooper v. London & North-Western Rail. Co.* (50 L. J. C. P. 103). A railway company is not liable for the wrongful act of third persons over whom they have no control. (*Wright v. Midland Rail. Co.*, L. R. 8 Ex. 137.)

Liability of carriers of passengers.

The issuing of a ticket for a journey from one place to another is evidence of a contract to convey the passenger within a reasonable time on such journey, but not that the train shall arrive at the time expected. (*Hurst v. Great Western Rail. Co.*, 34 L. J. C. P. 264.) Railway companies are liable to any person who has taken a ticket for a train advertised in their time-bills to run at a particular time if it does not run (*Denton v. Great Northern Rail. Co.*, 25 L. J. Q. B. 129), or there is not room in it for such person. (*Great Northern Rail. Co. v. Hawcroft*, 21 L. J. Q. B. 178.) Where railway companies stipulate in their time-tables, &c., that they will not be responsible for delays in arrival or departure of trains, they will still be liable for unreasonable delays, though they are not liable in case of reasonable delay. (*Prevost v. Great Eastern Rail. Co.*, 13 L. T. N. S. 20.)

Issuing ticket evidence of contract to carry within reasonable time.

Where passengers are carried at their own risk (as in the case of cattle drovers holding a free pass with such a stipulation), the carrier is not liable for injuries through negligence, either on the transit or on the company's premises, in consequence of their being in a dangerous condition. (*Gallin v. The London & North Western Rail. Co.*, 44 L. J. Q. B. 80.) A similar contract with one company protects another company over whose lines the passenger is carried for injuries caused through the negligence of the latter on their line.

Where passenger is carried by a free pass.

2. The defendants have not delivered the said trunks to the plaintiff or any of them.

Liability of carrier for passenger's luggage.

The question of the extent of a common carrier's liability for the luggage of passengers is one on which there is great conflict among the authorities. At one time it has been suggested that a common carrier has the liability of an insurer for the luggage of passengers, and at another time that he has no greater responsibility for the passenger's luggage than for the passenger himself. (See *Richards v. London & Brighton Rail. Co.*, 7 C. B. 839; 28 L. J. C. P. 281; *Butcher v. London & South-Western Rail. Co.*, 16 C. B. 13; 24 L. J. C. P. 137; *Tally v. The Great Western Rail. Co.*, 40 L. J. C. P. 9; L. R. 6 C. P. 44; *Le Conteur v. London & South-Western Rail. Co.*, 35 L. J. Q. B. 40; L. R. 1 Q. B. 54.) All the cases were reviewed in *Bergheim v. The Great Eastern Rail. Co.* (3 C. P. D. 221; 47 L. J. C. P. 318), and the Court of Appeal suggested the distinction that while a carrier may be liable as an insurer for luggage which is taken charge of entirely by the defendants, as where luggage is placed in a van, they are certainly not insurers of that portion of a passenger's luggage which is, at his request or with his consent, placed in the same carriage in which he travels or is about to travel. In such a case they are only liable when it can be shown that their negligence has brought about the loss.

Personal luggage means the class of articles which are ordinarily or usually carried by passengers as their luggage. (*Hudston v. Midland Rail. Co.*, L. R. 4 Q. B. 366; *Macrow v. Great Western Rail. Co.*, L. R. 6 Q. B. 612.) See decisions on questions whether certain things were personal luggage, *Macrow v. Great Western Rail. Co.*, *supra*; *Phelps v. London & North-Western Rail. Co.*, 34 L. J. C. P. 259; *Mytton v. Midland Rail. Co.*, 4 H. & N. 615; 28 L. J. Ex. 385; *Becher v. Great Eastern Rail. Co.*, L. R. 5 Q. B. 241.

Where passenger takes merchandise as personal luggage.

If a passenger who knows he is only entitled to take personal luggage takes merchandise, he is not entitled to recover for its loss from a railway company to whom he has given no notice of the contents of the package. (*Cahill v. London & North-Western Rail. Co.*, 31 L. J. C. P. 271; *Belfast & Ballymena Rail. Co. v. Keys*, 9 H. L. Cas. 556.) The fact of a package being marked "Glass" is not sufficient notice to a company that the contents are merchandise within the meaning of the foregoing propositions. (*Id.*)

What damages a passenger may recover from the carrier.

Measure of damages.—If in consequence of the wrongful delay or erroneous information of a carrier, a passenger is obliged to hire another conveyance or to stop a night on his journey, he can recover his expenses, but he is not entitled to general damages for the derangement or loss of business, trouble, or inconvenience caused to him. (*Great Northern Rail. Co. v. Hawcroft*, 21 L. J. Q. B. 178; *Denton v. Great Northern Rail. Co.*, 25 L. J. Q. B. 129; *Woodger v. Great Western Rail. Co.*, L. R. 2 C. P. 318.) Where a railway company instead of conveying the plaintiff to the station to which she had booked turned her out on a wet night at a station where she could get no accommodation or conveyance, and in consequence she had to walk a distance of four miles to her home, whereby she took a cold and was laid up, and incurred expense in getting cured, and was hindered in her business, she was held entitled to recover damages for the inconvenience suffered in consequence of being obliged to walk home, but not for the other consequences just mentioned, they being regarded as too remote. (*Hobbs v. London & South-Western Rail. Co.*, L. R. 10 Q. B. 111.) But as to this case, see *McMahon v. Field* (7 Q. B. Div. 591; 50 L. J. Q. B. 552; 45 L. T. 381), in which it was adversely commented on by the Court of Appeal.

With regard to personal injuries or death of a passenger caused by the

Full particulars of the contents of the said trunks and their value, exceeding three folios in length, accompany the claim.

The plaintiff claims £90.

Defence.

The defendants never received the said trunks and their contents or any of them.

Reply.

The plaintiff joins issue upon the defence.

negligence of carriers, besides other damages, the plaintiff can recover in proportion to the average income of the person injured or killed at the time of the accident. See "*Negligence*," and "*Executors and Administrators*."

Defences.—Denial of negligence is one of the most usual defences set up in actions against passenger carriers, and in the large class of cases where injuries are caused by railway collisions or trains running off the lines or the like, is as a rule the only available defence. But where an action is brought in the case of isolated accidents, as where a passenger steps out of a railway carriage, on its stopping a short distance behind or beyond the platform in consequence of the train being pulled up too soon or its "over-shooting" the platform, the defence of contributory negligence is generally set up together with the denial of the negligence. These defences will be found noticed under the head of negligence.

Contributory negligence.

With regard to the loss of luggage it is a good defence that the owner thereof has specially undertaken to watch it. (*Brind v. Dale*, 2 M. & W. 775.) It is also a good defence in such cases that the loss was occasioned by the passenger's negligence. (*Talley v. Great Western Rail. Co.*, *supra*.) But where carriers provide servants to assist passengers to remove their luggage on arrival, the liability of the carriers continues until the servants have done their duty, such as placing the luggage in a cab. (*Richards v. London, Brighton, & South Coast Rail. Co.*, 7 C. B. 839; *Butcher v. London & South-Western Rail. Co.*, 24 L. J. C. P. 137. See also *Patscheider v. Great Western Rail. Co.*, 3 Ex. D. 153; 38 L. J. N. S. 149.)

Defence in case of luggage that passenger took it under his own care.

The case of *Gabell v. The South-Eastern Rail. Co.* (2 C. P. Div. 416; 46 L. J. 771), in the Court of Appeal, is the leading authority as to the extent to which carriers can, by tickets with printed conditions on the back, relieve themselves from responsibility in respect of packages left at "cloak rooms" at railway stations. Mellish, L.J., laid down the law thus:—"If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; if he knew that there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the delivering the ticket to him in such a manner that he could see there was writing upon it, was in the opinion of the jury reasonable notice that the writing contained conditions." (See also *Harris v. Great Western Rail. Co.*, 45 L. J. Q. B. 729; 1 Q. B. D. 515; *Henderson v. Stevenson*, L. R. 2 H. L. 470; and *Watkins v. Rymill*, 10 Q. B. D. 178, where all the authorities are reviewed and considered.)

Luggage deposited in "cloak" room.

3. *Action by Complinee for Damage to Goods in Transit.*

1. On the 16th of December, 1880, the plaintiff delivered to the defendants two packages of glass to be by them conveyed, as common carriers, from Brighton to Eastbourne, and delivered to the plaintiff.

2. The said packages of glass were delivered by the defendants in a broken and totally worthless condition.

Particulars of damages :—

20 squares of glass at 30s. a square . . £30 0 0

The plaintiff claims £30.

Defence.

1. The said goods delivered to the defendants by the plaintiff were above the value of £10, and consisted of articles mentioned in the first section of the Land Carriers Act (11 Geo. IV. & 1 Will. IV. c. 68), that is to say, glass, and their value and nature was not declared or any increased charge paid, or any engagement entered into by the plaintiff to pay such increased charge.

Reply.

The plaintiff joins issue upon the defence.

4. *Claim against a Common Carrier for Loss in Transit and alternatively for Conversion.*

1. On the 13th of April, 1880, the plaintiff delivered to the defendant, as a common carrier, three cases of gloves, the property of the plaintiff, to be by him carried to the West India Docks.

2. The defendant only delivered one case of gloves at the West India Docks, and the said case had been opened and two dozen pair of gloves taken out of it.

3. In the alternative the plaintiff says that the defendant or his servants have converted the said two cases of gloves and the two dozen pair of gloves taken out of the third case to his or their own use, and wholly deprived the plaintiff of the same.

Particulars of damage :—

One case of — gloves . . .	£15	0	0
One case of — gloves . . .	10	0	0
Two dozen pair of gloves . . .	2	0	0

The plaintiff claims £27.

Defence.

1. The defendant is not a common carrier.
2. He denies that the said gloves were the property of the plaintiff.
3. The defendant received the said three cases of gloves under a contract to take reasonable care of them.
4. The defendant did take reasonable care of them ; and the said two cases of gloves and the two dozen pair were not lost or stolen through any negligence on his part.
5. The defendant denies that he or his servants have converted the said gloves or any of them to his or their own use as alleged or at all.

Reply.

The plaintiff joins issue upon the defence.

5. Claim for Delay in Arrival of Train and Loss of Market.

1. The plaintiff has suffered damage by the breach by the defendants of a special contract made between the parties on the 9th of February, 1880, by which the defendants undertook to forward the plaintiff's eight horses from A. station by the 7.40 p.m. train, and deliver them at B. the same night.

2. The said horses were not delivered at B. until noon of the 10th of February and after the B. fair, for sale at which the said horses had been sent to B., was over.

Particulars of damage :—

Paid carriage of eight horses from A. to B. and back again	£9	10	0
Paid fares of two men in charge of them and their wages	3	10	0
Estimated loss of profit at the B. market.	32	0	0

The plaintiff claims £45.

Defence.

1. The said horses were not received by the defendants under any special contract by which they agreed to deliver them at B. on the evening of the 9th of February.

2. They were received by the defendants at the A. station too late on the 9th of February to be forwarded by any train to B. that evening. They were despatched by the first ordinary train which left A. after the defendants received them, and they arrived at B. without any unreasonable delay.

3. The defendants had no notice or knowledge that the said horses were intended for sale at the B. fair.

Reply.

The plaintiff joins issue upon the defence.

6. Claim by Carrier against Consignor for Freight.

1. Between the 5th of May, 1880, and the 7th of June, 1880, the defendant delivered 1200 tons of coal to the plaintiffs at their A. station under an agreement of the 1st of May, 1880, that the said coals were to be carried by the plaintiffs to P. and delivered to the defendant's order at a freight of 5s. per ton.

2. The plaintiffs duly carried and delivered all the said coal, but the defendant has paid them the sum of £200, and no more.

The plaintiffs claim the balance of £100.

7. Defence to an Action by Carrier against Consignee for Freight, where the Writ is specially indorsed, and no Statement of Claim delivered.

1. The plaintiffs did not carry for and deliver to the defendant 20 tons of salt, as alleged in the indorsement on the writ herein. They only carried and delivered 15 tons.

2. The freight claimed of 30s. per ton is in excess of the rates, which the plaintiffs by their Act of Parliament are authorised to charge, and is an unlawful and unreasonable charge.

3. The defendant brings into Court the sum of £10 10s., and says that the same is sufficient to satisfy the plaintiffs' claim herein.

8. Statement of Claim against a Carrier for loss of a Passenger's Luggage, and alternatively alleging Negligence on the Defendants' part.

1. On the 3rd of February, 1881, the plaintiff was a passenger on their railway from Carlisle to London, and as such passenger he placed under the defendants' charge as common carriers a portmanteau, forming part of his personal luggage.

2. The defendants have not re-delivered to the plaintiff the said portmanteau.

3. In the alternative the plaintiff says, that by reason of the defendants' negligence the said portmanteau was lost or stolen in the course of transit.

Prior to action brought, a complete list of all the articles in the said portmanteau and their value was delivered to the defendants.

The plaintiff claims £40.

Defence.

1. The plaintiff was not a passenger on the defendants' railway on the said 3rd of February, 1881, or at all.

2. He did not place the said portmanteau under the defendants' charge.

3. The said portmanteau contained merchandise, and not the personal effects of the plaintiff.

4. If the plaintiff was a passenger on the defendants' railway on the said day (which they deny), they say that the plaintiff instead of causing the said portmanteau to be placed in the van, took it into the carriage with him, and if it was lost, it was lost through his own negligence.

5. The defendants do not admit that the said portmanteau was ever lost or stolen.

6. The defendants deny that they were guilty of any negligence which led to its loss or theft.

7. The defendants do not admit that the said portmanteau contained all or any of the articles set out in the particulars delivered, or that they were of the values mentioned therein.

Reply.

The plaintiff joins issue upon the defence.

9. *Claim against a Lighterman as Common Carrier, and alternatively alleging Negligence for Damage to Goods in Transit.*

1. On the 3rd of May, 1880, the plaintiff delivered to the defendant as a common carrier by water certain goods, that is to say, six casks of coffee, to be carried by the defendant from the N. Dock to the L. Dock.

2. The defendant delivered them at L. Dock in a broken and damaged state, and with the coffee in the said casks almost entirely destroyed by water.

3. Alternatively the plaintiff says that in consideration of the freight which he paid to the defendant, the defendant warranted that the lighter in which the said goods were to be conveyed was tight, staunch, strong, and fit to carry them, and that he would use due care, skill and diligence in and about carrying the said goods.

4. The said lighter was not tight, staunch, strong or fit to carry the said goods, and the defendant did not use due care, skill or diligence in their carriage, whereby the said casks were broken and damaged, and the coffee injured, as alleged.

The plaintiff claims £200 damages.

Defence.

1. The defendant is not a common carrier.

2. He did not warrant that the said lighter was tight, staunch, strong and fit to carry the said goods.

3. In fact, the said lighter was tight and staunch, and the defendant was not wanting in due care, skill or diligence in the conveyance of the said goods.

4. The injury to the goods was in consequence of the act of God, viz., lightning and tempest.

Reply.

The plaintiff joins issue upon the statement of defence.

10. *Claim against a Carrier by Sea for Non-delivery of Goods.*

1. On the 10th of March, 1882, the plaintiff caused to be shipped on board the defendants' steamer, the "C.," then at A., 180 bundles of iron rails, to be by the defendants as common carriers conveyed from the port of A. to the port of L.

2. On arrival at the port of L., the defendants only delivered 140 bundles of the said iron rails to the plaintiff.

The plaintiff claims £60 damages.

Defence.

1. The defendants did not receive the said iron rails, or any of them, as common carriers, but under a special contract in writing with the plaintiff, by which it was agreed that in consideration of a lower rate of freight paid to the defendants, that they should only be liable for any loss or injury to the said iron rails, if such loss or injury was due to their wilful act or default, or the wilful act or default of any of their servants.

2. The defendants only received 140 bundles of iron rails.

3. If they did receive a greater number, they say they have duly delivered them to the plaintiff.

4. The defendants have not been guilty, nor have their servants been guilty of any wilful act or default in connection with the conveyance of the said iron rails.

Conditions Precedent (a).

(a) By the Common Law Procedure Act, 1852, s. 57, it was provided that a plaintiff or defendant might in any action aver the performance of conditions precedent generally, and that the opposite party should not be at liberty to deny such averments generally, but should specify in his pleading the condition or conditions precedent, the performance of which he meant to contest. Since the Judicature Act, 1873, and up to the coming into operation of the Rules of the Supreme Court, 1883, the practice in settling pleadings was to act in conformity with the above section. But now by Order XIX. r. 14, "any condition precedent the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be), and subject thereto an averment of the performance or occurrence of all conditions precedent necessary for the case of

Conversion.

See *Trotter*.

Copyright (a).

1. *Claim for Damages for Infringement of Copyright.*

The defendant has infringed the plaintiff's copyright in a book entitled "The History of Rome," registered on the day of

Length of
copyright.

Registra-
tion neces-
sary.

the plaintiff or defendant shall be implied in his pleading." The effect of this is that *now* it will *not* be proper for the plaintiff in his statement of claim, or the defendant in his counter-claim to allege the performance of conditions precedent. The law implies their fulfilment until the defendant in his defence, or the plaintiff in his reply to a counter-claim by a specific denial of any one or more conditions precedent puts the question of their due fulfilment in issue.

(a) The copyright in books, magazines, maps, charts, &c., is regulated by the 5 & 6 Vict. c. 45, which by sect. 2 gives to the author and his assigns an exclusive right of publication for the life of the author, and seven years after his death, with the important provision that if the seven years shall expire before the forty-two years from the first publication of the books, &c., are accomplished, then the copyright shall endure for the full period of forty-two years. When the book, &c., is published after the death of its author, the copyright lasts for forty-two years from the time of the first publication, and it "shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns." An action for any infringement of copyright is brought by the person in whom the copyright is vested at the time at which the cause of action arose, and he may be either the author, or his executors or administrators, or some person to whom he has assigned his interest in the copyright. But it is a condition precedent to bringing any action that the plaintiff shall prove that he has duly caused his copyright in the book in question to be registered at Stationers' Hall. (Sect. 24.) The mere fact of registration is not, however, conclusive of a plaintiff's rights, because he can have no copyright in a work until its publication. (*Marwell v. Hogg*, 36 L. J. Ch. 433; L. R. 2 Ch. App. 307; *Henderson v. Maxwell*, 5 Ch. D. 892.) The plaintiff in order to make a valid registration must register the name of the first publisher; and if he fails to do so, the registration is void, and he may not sue. (*Weldon v. Dickes*, 10 Ch. D. 247; *Coote v. Judd*, 23 Ch. D. 727.) The 16th section of the 5 & 6 Vict. c. 45, provides that a defendant in pleading to an action for an infringement of copyright shall give to the plaintiff a notice in writing of any objection to the plaintiff's title to the copyright on which he means to rely at the trial; and if the defence is that the plaintiff is not the author or first publisher of the book in which he claims copyright, or is not the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he says is the author or first publisher, or the proprietor, together with the title of such book, and the place where, and the time when such book was first published; and "at such trial no other objection shall be allowed to be made

Particulars of special damage are as follows :—

Loss of sale of 50 copies . . .	£50 0 0
Loss of profit in the copyright . . .	50 0 0

The plaintiff claims £100.

on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication, with the title, time, and place specified in such notice." See on this section the case of *Hall v. Bradbury*, 12 Ch. D. 886; *Coote v. Judd*, 23 Ch. D. 727. In this latter case it was decided by Bacon, V.C., that in an action for infringement of copyright, where objections to the registration are not delivered within the prescribed time, the action may nevertheless be dismissed if a defect in the registration is brought out from the plaintiff's evidence.

A collection of prints, published together in a volume, is a book within the meaning of the 5 & 6 Vict. c. 45; and the proper subject of copyright, though it contains no such letter-press as could be the subject of copyright, and it makes no difference that the work is not published for sale, but only used as an advertisement. (*Maple & Co. v. Junior Army & Navy Stores*, 21 Ch. D. 369, overruling *Cobbett v. Woodward*, L. R. 14 Eq. 407.) A compiler of a directory is not justified in using slips cut from a directory previously published for the purpose of deriving information from them for his own work, but he may use such slips for the purpose of directing him to the parties from whom information can be obtained. (*Morris v. Wright*, 5 Ch. 279; *Kelly v. Morris*, 1 Eq. 697; *Morris v. Ashbee*, 7 Eq. 34.)

Prints entitled to copyright.

In the recent case of *Dicks v. Gates*, 18 Ch. D. 76, the Court of Appeal intimated that as a rule there cannot be any copyright in the mere title of a book, and they decided in the case before them that the plaintiff could have no copyright in the title "Splendid Misery," because copyright can only exist in something original, and the mere adopting as a title a hackneyed phrase could not give any copyright.

Copyright only in something original.

There is no valid copyright in illegal or immoral publications. (*Southey v. Sherwood*, 2 Mer. 435, 439.)

The copyright in engravings and prints, sculptures, models, copies and casts, and designs for ornamenting articles of manufacture, is regulated by the following statutes :—8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; 54 Geo. 3, c. 56; 14 & 15 Vict. c. 8; 15 & 16 Vict. c. 6; and the 46 & 47 Vict. c. 57 (the Patents, Design, and Trade Marks Act, 1883). It has been held that photograph copies come within these statutes. (*Graves v. Ashford*, L. R. 2 C. P. 410; 36 L. J. C. P. 139.)

Dramatic and musical works are protected by 3 & 4 Will. 4, c. 65, and 5 & 6 Vict. c. 45, ss. 20, 21. It has been held that the arranger of the score of an opera and not the composer should be registered as the author of the score, which is an original composition. (*Wood v. Boosey*, L. R. 2 Q. B. 340; 3 Q. B. 223.) In an action for infringing the right to the exclusive representation of a drama, if it only be proved that part of the drama has been represented by the defendant, it is necessary for the plaintiff to show as a matter of fact that the part represented is a material and substantial portion of the drama. (*Chatterton v. Clegg*, 2 C. P. D. 42; 3 App. Cas. 483; 47 L. J. C. P. 545.)

Dramatic and musical works.

In the late case of *Wall v. Tylor*, 11 Q. B. D. 102, the Court of Appeal decided that a person whose right, under sect. 20 of the 5 & 6

Defence.

1. The plaintiff is not the author.
2. The book was not registered.
3. The defendant did not infringe.

2. *Claim by Assignee of the Copyright for Damages for Infringement.*

1. The plaintiff is the assignee of the copyright in a book entitled _____, registered on the _____ day of _____.
2. The defendant, since the plaintiff became the assignee, has infringed his copyright in the said book.

Particulars of special damage are as follows :—

Loss of sale of _____ copies
 Loss of profit on copyright

The plaintiff claims £180.

3. *Claim by Assignee of the Copyright of a Musical Composition for a Penalty for its Infringement.*

1. The plaintiff is the assignee of the copyright in a musical composition called "Will o' the Wisp," registered on the _____ day of _____.

Copyright
in dramatic
and musical
works.

Vict. c. 45, to the sole liberty of representing a musical composition has been infringed, is entitled to recover the penalty of 40s., given by sect. 2 of the 3 & 4 Will. 4, c. 15, although such musical composition has not been represented at a place of dramatic entertainment. Now by the 45 & 46 Vict. c. 40, a proprietor of the copyright in any musical composition first published after the passing of the Act, or his assignee desirous of retaining in his own hands the exclusive right of public representation, or performance of the same, shall cause to be printed upon the title-page of every published copy of such musical composition a notice, to the effect that the right of public representation, &c., is reserved. (Sect. 1.) There are other provisions of the Act on the subject of musical compositions.

An assignment of copyright must be in writing. Accordingly, when the author of a song agreed verbally with S. to part with his copyright, and subsequently by instrument in writing assigned it to L., who entered it at Stationers' Hall, it was held that the title of L. must prevail. (*Leyland v. Stewart*, 4 Ch. D. 419.)

A newspaper is within the Copyright Act; and a proprietor of a newspaper before he can sue in respect of a piracy of any article therein, must show not merely that the author of the article has been paid for his services, but that it was written on the terms that the proprietor of the newspaper should have the copyright. (*Walter v. Howe*, 17 Ch. D. 706; not following *Cox v. Land & Water Journal Co.*, 9 Eq. 324.)

2. The defendant on the day of , 1880, infringed the plaintiff's said copyright by representing or causing to be represented, without the consent in writing of the plaintiff, the said musical composition at a place of dramatic entertainment, called Bolingbroke Hall, in the county of Surrey.

The plaintiff claims the penalty of 40s. given by the statute 3 & 4 Will. IV. c. 15, s. 2.

Defence.

1. The plaintiff is not the assignee of the said copyright.
2. The defendant did not represent or cause to be represented the said musical composition, as alleged in the statement of claim or at all.
3. The said offence, if committed by the defendant (which he denies), was committed more than twelve calendar months before action brought.

Reply.

The plaintiff joins issue upon the defence.

Corporation (a).

Defence to an Action against a Local Board that the Contract sued on was not under Seal.

The contract sued upon by the plaintiff was a contract made (if at all) by the defendants as an urban authority under the

(a) The common law rule is that corporations can only sue or be sued upon contracts made under their common seal. To this principle there are a few exceptions, as, in the case of incorporated companies having gain for their object, who are liable upon contracts not under seal, provided they are necessary for and incidental to the purposes for which they are created. (*South of Ireland Colliery Co. v. Waddle*, L. R. 4 C. P. 617; 38 L. J. C. P. 338; *Reuter v. The Electric Telegraph Co.*, 6 E. & B. 341; 26 L. J. Q. B. 46. In the *East London Waterworks Co. v. Bailey* (4 Bingham, 283), Best, C.J., enumerated the exceptions to the general rule that a corporation cannot express its will except by writing under its common seal.

By sect. 85 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), every contract by a local board of health whereof the value exceeds £10, and by sect. 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), every contract by an urban authority, whereof the value exceeds £50, shall be

38 & 39 Vict. c. 57, and though the value or amount of the said contract exceeded £50, the same was not made in writing sealed with the common seal of such authority.

Covenant.

1. Claim by Covenantee against Covenantor on a Covenant to pay Money.

The plaintiff's claim is for principal and interest due under a covenant in a deed dated the 1st of January, 1882.

Particulars :—

Principal	£100	0	0
Paid	20	0	0
Principal due	80	0	0
Interest	3	0	0
Amount due	£83	0	0

The plaintiff claims £83.

Defence.

The deed upon the covenant in which the plaintiff sues was made by the defendant as part of the compromise of certain criminal proceedings for alleged forgeries, which the plaintiff

in writing, sealed by the common seal of such board or authority, as the case may be. It was decided in *Hunt v. The Wimbledon Local Board* (4 C. P. D. 49; 48 L. J. C. P. 207) that where the defendants, a local board, had authorised their surveyor to employ the plaintiff to prepare certain plans for offices they intended to erect, but which they did not erect, though the jury found that the offices were necessary for the purposes of the defendants, yet inasmuch as the value of the work exceeded £50, and there was no contract under seal, that the plaintiff could not recover. On the other hand, where an urban sanitary authority upon an outbreak of scarlet fever in its district, agreed with the plaintiff, a medical practitioner, by a contract not under seal, to pay him for attending to the fever patients at the rate of 5s. 3d. per day for each of the tents in which the patients were received, and his charges in all amounted to £97 7s. 9d., in an action against the authority to recover this amount, it was held by the Court of Appeal, distinguishing *Hunt v. The Wimbledon Local Board* (*supra*), that the agreement between the plaintiff and the defendant was not a contract "whereof the value or amount exceeds £50," and that the plaintiff was entitled to recover. (*Eaton v. Basker*, 50 L. J. Q. B. 444.)

had instituted against him, and which were then depending, and the defendant only signed the said deed in consideration that the plaintiff would not further prosecute the said charges of forgery.

2. Another Claim by Covenantee against Covenantor on a Covenant to pay Money.

The defendant by her deed, dated the 1st of May, 1882, covenanted to pay to the plaintiff the sum of £200 on the 1st of June, 1882.

The plaintiff claims £200.

Defence and Counter-claim.

Defence.

1. At the time the defendant signed the said deed, she had just attained her twenty-first year.
2. The plaintiff is her uncle, with whom she was residing at the time.
3. The defendant had no independent advice or legal assistance at the said time, and she was acting entirely under the advice and compulsion of the plaintiff.
4. The plaintiff induced the defendant to sign the said deed by representing to her that it was a mere form, and that she would never have anything to pay under it.

Counter-claim.

5. And, by way of counter-claim, the defendant repeats all the allegations contained in the 1st, 2nd, 3rd, and 4th paragraphs hereof, and claims

- (1.) that the said deed of the 1st of May, 1882, may be set aside and cancelled ; and
- (2.) that, if necessary, for the purpose aforesaid this action be transferred to the Chancery Division of the High Court of Justice.

Reply.

1. The plaintiff joins issue upon the defence.
2. As to the counter-claim the plaintiff says that at the time

when the said deed was signed the defendant did have independent advice and acted throughout under the advice of her solicitor.

3. She was not acting under the advice or compulsion of the plaintiff.

4. The plaintiff denies that he ever represented to the defendant that the said deed was a mere form and that she would not have anything to pay under it, or that he ever made any representation to that effect.

For other actions upon covenants see Bond, Landlord and Tenant, and Mortgages.

Defamation (a).

1. Claim for a Libel published in a Newspaper concerning the Plaintiff, an Officer in the Army.

1. The plaintiff has sustained damage by the defendant on the 7th of September, 1879, falsely and maliciously printing

What is a libel.

Averment of damage not essential.

Distinction herein between libel and slander.

Slander not generally actionable unless special damage averred.

(a) Anything written or printed and then published which is calculated to injure the reputation of another, or expose him to hatred, contempt, or ridicule, is a *libel*, and actionable as such without proof that the plaintiff has really suffered pecuniary loss or injury of any kind. It follows from this that it is *not essential* that the pleader in drawing a claim for libel should aver that the plaintiff has sustained actual damage, but until the Rules of the Supreme Court, 1883, it was usual to introduce a general allegation that he had suffered greatly in his credit and reputation, and had endured anguish of mind. General averments of that kind are now discouraged, but where any special damage has really been sustained by the plaintiff on which he relies to aggravate the damages, it should certainly be set out in the claim.

There is an important distinction between the defamation which constitutes libel and that which constitutes slander. It is not law that anything *spoken* which is calculated to injure the reputation of another, or expose him to hatred, contempt, or ridicule, is actionable, without proof that the plaintiff has suffered actual damage. Certain classes of oral defamation, which will be referred to immediately, are actionable in themselves, just as written or printed defamation is actionable in itself; but, as a rule, *mere oral* defamation is not actionable without proof of actual, or as it is called, "special damage." Thus, to say of a man that he is a rogue, or of a woman that she is unchaste (*Wharton v. Brook*, 1 Ventr. 21), is not sufficient to ground an action, though to write or print the same thing, and then publish the writing or print, would be highly actionable. But if actual loss or injury directly results to the plaintiff from the defendant speaking those words, they would at once found proceedings. In such a case it will be seen a material element in the action is the special damage, and it then becomes *necessary* for the pleader specially to aver the damage, so that it may clearly appear on

and publishing in a newspaper called the — of and concerning the plaintiff, and of and concerning his conduct as an

the face of the claim. If in an action for slander, not coming within the exceptions now to be noticed, the pleader omitted to aver special damage, or set it out so insufficiently that it did not appear that the damage was of a kind that the Court could take cognizance of, then under the old system the claim would have been demurrable, and it will still be insufficient.

There are, however, three classes of cases where slander is placed on the same footing with libel, and no averment of special damage is essential:—1. Any imputation that another has committed any criminal offence, as that he is a thief, or has committed murder, or rape, or robbery, is actionable *per se*. (*Webb v. Beavan*, 11 Q. B. D. 609.) 2. So an imputation that another has contracted a contagious disease, unfitting him for decent society. 3. So any imputation with reference to another in his profession or trade, imputing any incompetency, or dishonesty, or disgraceful or improper conduct in relation thereto. In these cases the pleader is not bound to aver special damage in the claim (though if special damage has in fact accrued he ought to do so); he must take care, however, to make it very clear on the face of the pleading that the slanderous words really do belong to one of these classes. For instance, where the alleged slander is a reflection upon a man in the way of his profession, it should appear on the claim that the plaintiff exercised a particular profession, and then it should be positively averred that the words complained of were spoken of him with reference to such profession. The result is this. In cases of libel it is not essential to aver damage; in slander it is essential to do so, except in a limited number of cases.

Exceptions to this rule.

Subject to what has been said with reference to the averment as to special damage, and subject to this difference also that in the case of libel the libellous matter is alleged to have been written or printed, and in cases of slander, it is alleged to have been spoken, the averments that appear in a pleading for libel, and those that appear in a pleading for slander are the same, and it will therefore be convenient to treat of them together.

Material averments.—A claim for libel or slander commences that the defendant named on a date specified *falsely* and *maliciously* wrote (or printed or spoke) and *published* of and concerning the plaintiff the words following, that is to say, then follow the words complained of. There may follow after this some averment of damage; in some cases, as already pointed out, it is essential. The material averments here are: 1st. The falsehood of the matter. 2nd. The malice of the defendant. 3rd. The fact of publication. 4th. The connection of the defamation with the plaintiff. 5th. The words of the defamation. And, 6th. Where the defamation is oral, generally the special damage.

The material averments in an action for defamation.

1. **The Falseness of the Defamation.**—It is necessary to aver that the words or writing complained of are false, for if they be true, then there is no libel or slander, for which a remedy can be had in a civil court. It is different where the party libelled seeks a remedy in a criminal court, and indicts his libeller. There the old saying, the greater the truth the greater the libel, to a certain extent holds, and the fact that the libel is true will be no shield to its publisher, unless he can show that his act in disclosing the matter was for the public good. This, however, concerns criminal law. What the pleader has to remember is this, that a plaintiff cannot recover damages against another for writing or saying of him that which, however defamatory, and injurious, and annoying, is nevertheless true.

The truth of the libel an answer in a civil court.

Aliter in case of an indictment.

officer in the army, the words following, that is to say—[*Here set out verbatim the words complained of with appropriate*

The advisability of expressly averring malice.

2. *The Malice*.—The next averment is that the defendant *maliciously* wrote or spoke, &c. Malice—the malicious act of the defendant—is so important an element in this action that, as will be shown hereafter, if once the conduct of the defendant can be so explained as to get rid of the imputation of malice, and it is made clear that no improper feeling was at the bottom of his conduct, then the liability of the defendant is at an end. It is therefore an invariable practice to aver that the defendant acted maliciously, but it is not absolutely necessary to do so. The full text of the libellous matter is always set out on the face of the pleading, and from it and the averment of its falsehood, the Court may infer the malice, though it is not alleged: but it is certainly the more advisable course, to avoid all question, to aver malice expressly. In this connection Order XIX. r. 22 must be borne in mind. “Whenever it is material to allege *malice*, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.”

A publication of the libel essential.

3. *The Publication*.—The third material averment is that the defendant *published*, &c. A man may compose a very injurious libel, and put it away in his desk, he may reduce defamatory statements to writing, and send them to the person whom they defame (*Phillips v. Jansen*, 2 Esp. 624), he may slander another to his face when no one is by: and in none of these cases will he have exposed himself to an action. The libellous or slanderous matter must be *published* to become actionable; and as publication is thus of the essence of the action, it is necessary that the pleader should specially aver the fact in the statement of claim. It is not within the scope of this work to discuss what constitutes a publication of a libel or slander. This much may be said: it is not necessary that the libel should have attained any widespread publicity. If by the act of the defendant it has obtained *any* publicity beyond the defamer and the defamed, if any third person,—even the plaintiff's wife (*Wenman v. Ash*, 13 C. B. 836)—has seen it, that is enough. Thus a slander uttered in the presence of the defamed and a third person is published, and a libel written in a letter intended for the person libelled, and misdirected by the defendant to another, is published as soon as that other reads it, and from that moment the plaintiff has a ground of action. (*Foe v. Braderick*, 14 Ir. C. L. R. 453.)

What amounts to a publication.

The plaintiff must be identified with the defamation.

4. *Connection of the Plaintiff with the Defamation*.—But not only must the defamatory matter be alleged to be published, to be false and to be malicious, it must also be alleged to be spoken of and concerning the plaintiff. The plaintiff seeks damages in respect of an injury done to his reputation. It may well be that the defendant is the author of a most abominable libel; but unless the plaintiff avers and proves that the defamation has reference to him and is a reflection upon his character, he makes out no case. Hence the necessity for averring, as is always done, that the words complained of were spoken, &c., and published “of the plaintiff,” or “of and concerning the plaintiff;” and the necessity of this averment is only dispensed with where the libellous matter itself manifestly points and applies to the plaintiff. But the necessity of strictly identifying the plaintiff with the defamatory matter does not end with this general averment. In the body of the pleading the full text of the libel or slander is set out, and here it is the duty of the pleader, *wherever it is necessary* to interpolate an averment or “innuendo,” as it is called, connecting the plaintiff with any statement which on its face may not seem clearly to apply to him, but which was

innuendoes], meaning thereby that the plaintiff had been removed from the army for misconduct, and that he had not conducted himself as an officer and a gentleman.

The plaintiff claims £1000 damages.

intended to apply to him. Instances of these innuendoes will be found in the text. What the pleader has to secure is this, that by the plain words of the libel or slander, plus the innuendoes introduced by him, it may clearly appear on the face of the claim that the defamation applies to the plaintiff, and not to some other person.

5. *The Defamatory Matter*.—Next, it is essential that the libellous or slanderous words be set out at length. The very words used must be given. Merely setting out the effect of the words would not be enough. (*Gatoole v. Mathers*, 1 M. & W. 495); and the recent case of *Harria v. Warre*, 48 L. J. C. P. 310; 4 C. P. Div. 215, to the same effect. Neither would a claim charging a libel "in substance as follows" (*Wright v. Clements*, 3 B. & Ald. 503), or "purporting" (*Wood v. Brown*, 6 Taunt. 169); so a claim charging that the defendant "asserted and accused the plaintiff of." (*Cook v. Cox*, 3 M. & S. 110.) The words must be set out as used, so that the Court may judge whether they are capable of a defamatory meaning, and the jury say whether they have a defamatory meaning in fact.

The defamatory matter must be set out verbatim.

If the libel or slander is in a foreign language, it would not be correct to set out merely a translation. The original words must be stated, and then the meaning explained in English. (*Zenobia v. Artell*, 6 T. R. 162.) In the case supposed of a libel in a foreign language, it would also be necessary to aver in the statement of claim that someone who read the libel, or in whose hearing it was uttered, understood the language, else there would be no publication. (1 Wms. Saund. 242.) It has been already pointed out that it is necessary that it should appear, either by the words themselves or the words aided by proper innuendoes, that the defamatory matter applied to the plaintiff. It is equally necessary that it should appear on the face of the claim that the words complained of constitute a libel or slander. If, as is frequently the case, the words bear a plain meaning and that a defamatory one, nothing remains to be added; but where the meaning of some of the expressions is ambiguous, or even innocent in their natural meaning, it becomes necessary for the pleader to aver that the defendant used the words in a particular defamatory sense, and that defamatory sense he must specify.

Where the libel is in a foreign language.

Special Damage.—There is much learning to be found in the books as to what constitutes special damage, sufficient to make oral defamation actionable. The subject is very fully discussed in the notes to *Vicars v. Willcock* (2 Smith's Leading Cases). See also *Hiding v. Smith*. (45 L. J. 281; 1 Ex. Div. 91.) It is not every injury or loss to the defendant, resulting from the speaking of the slander, that is regarded as special damage. To be actionable, the special damage must be the natural and proximate consequence of the defamation. Thus, illness of body caused by slanderous words cannot be relied on as special damage, because not a consequence that commonly happens under like circumstances. (*Allsop v. Allsop*, 5 H. & N. 534.) So exclusion from a society of Protestant Dissenters is not special damage. (*Roberts v. Roberts*, 5 B. & S. 384.) In *Chamberlain v. Boyd* (11 Q. B. D. 407), it was decided by the Court of Appeal that an allegation that in consequence of the defamatory words a majority of the members of a club were induced to retain a regulation under which the plaintiff had already been rejected, and thereby prevented him from again seeking to be elected, did not disclose sufficient pecuniary damage to support the action; but the

What amounts to special damage.

Defence.

1. The defendant denies that he either printed or published the alleged libel.
2. The defendant denies that the said words in any way referred to the plaintiff.

Special damage.

loss of the hospitality of friends &c. (*Dart v. Nodman*, L. R. 7 Q. B. 112.) Again, if the damage is caused not by the defendant's speech, but by the unauthorised repetition of what he said by another, the defendant is not liable. (*Ward v. Wood*, 7 Bing. 211.) So if the person to whom the defendant utters the slander as a consequence of hearing it does an unlawful act, he dismisses the plaintiff from his service without notice, such wrongful act cannot be charged against the defendant as special damage. (*Ward v. Wood*, 5 East, 1.)

An injunction may be granted.

It was held in several cases prior to the Judicature Act, that the Court of Chancery could not restrain by injunction the publication of a libel (*Prudential Insurance Co. v. Kent*, 10 Ch. D. 142), but since the Act it has been held that there is now full jurisdiction to issue an injunction. This was first decided in *Steele v. Liebrock* (3 C. P. D. 339). There the Court seemed disposed to limit the right to an injunction to cases where the publications complained of had been found to be a libel by a jury. But the later cases of the *Quartz-Hill Consolidated Gold Mining Co. v. Bate*, and *Hill v. Hart-Davis* (20 Ch. D. 501; 21 Ch. D. 798; 51 L. J. Ch. 845; 51 L. J. Ch. 874; 46 L. T. 746; 47 L. T. 82), establish that the Court may restrain a libel before the trial on an interlocutory application, but it was intimated by the Court of Appeal in the former case that the jurisdiction to issue an injunction in a case of alleged libel upon an interlocutory application must be exercised with great caution, and that it would not be generally exercised unless the applicant satisfied the Court that the statements contained in the document complained of were untrue. (See also the cases of the *Thorley Cattle Feed Co. v. Massam*, 14 Ch. D. 864; *Thomas v. Williams*, 14 Ch. D. 864.)

Defence of justification.

Defences.—The defences most commonly pleaded in actions for libel are as follows:—

1st. That the words written or spoken were true in substance and in fact. This used to be called a plea of justification, and if proved it is a good defence to the action. It is, however, a dangerous plea, and not to be recklessly put upon the record, because, in the first place, the strictest and most precise proof of it is required. (*Leyman v. Latimer*, 46 L. J. Ex. 765; 3 Ex. Div. 15, 352.) And secondly, if not proved, the fact that it has been pleaded is regarded as some evidence of express malice, and besides very much aggravates the damages.

2nd. *Privilege.*—Another defence is that the defamatory matter was published without malice, and upon a privileged occasion. One of the essential ingredients in an action for defamation is the malice of the publisher. Therefore if it is averred and proved that he had no malice in fact, the action is at an end; but it must be noticed that the word malice in this connection is not confined to its ordinary meaning of vindictiveness or animosity. A person will be presumed to publish a libel maliciously who publishes it without a sufficient justification. If a person recklessly or carelessly makes a defamatory statement with reference to another, whom it may be he has never seen in his life, and against whom he has no actual ill-will whatever, he is held to have published the slander maliciously, just as much as if he acted on the impulse

A defendant presumed to have published a libel maliciously.

3. The said words do not have the meaning which the plaintiff places upon them.

4. The alleged libel formed part of an article printed and

of a heart charged with the direst animosity. In point of fact the malice which a plaintiff relies on to support his action is frequently merely the inference of malice which the law draws from the fact of a publication without justification. This inference, however, can always be rebutted by the defendant showing that he published the matter complained of *bona fide* and on a justifiable occasion. When he is in a position to do this the pleader must raise the defence specially (*Belt v. Lawes*, 51 L. J. Q. B. 539); and he is then said to have pleaded privilege.

Presumption how rebutted.

The effect of a plea of privilege where it is sustained by the evidence, is not the same in all cases. There is what is called a *qualified* privilege and also an *absolute* privilege. In the former case—that of most frequent occurrence—the privilege, when proved, only rebuts the inference of malice arising from the fact of the publication of defamatory matter, and casts upon the plaintiff the burden of proving express malice, that is to say, of proving that although the defamation was published on an occasion justifying the defendant if he acted *bona fide* and without ill-will, in point of fact he did act from some personal animosity. Thus it will be seen that this plea of privilege ordinarily affords only a very qualified protection to the defendant. It is the function of the judge to decide whether the occasion of the publication was privileged or not. If he holds that it is not proved, then no question of the motive of the defendant need be put to the jury, for the law already sufficiently presumes the maliciousness of the act; but if he holds that the occasion of the publication was privileged, then in the case of qualified privilege now under consideration, the effect of his decision is that the legal inference of malice is rebutted, and the plaintiff must affirmatively prove malice in fact. On the other hand where an *absolute* privilege is proved, no question of malice can be left to the jury, and the case is at an end so soon as the judge has decided that the privilege arises at all.

Kinds of privilege.

The distinction between qualified and absolute privilege consists in this. In the former case the exigency on which the defamation was published, which is the justification of its publication, has reference to the protection of merely private interests; in the latter case the exigency has reference to the public service or the administration of justice. Cases belonging to the latter class are limited in number, but it has been decided that on grounds of public policy words spoken in Parliament are absolutely privileged (*Darison v. Duncan*, 7 E. & B. 229, 233); so words spoken by a judge in the course of judicial proceedings (*Scott v. Stansfield*, L. R. 3 Exch. 220); so the words of counsel in a like case (*Munster v. Lamb*, 11 Q. B. D. 588 (C. A.)); so the evidence of a witness (*Seamen v. Nethercliffe*, 1 C. P. D. 540; 2 C. P. D. 53; 45 L. J. 798; 46 L. J. 128); so reports made in the course of his duty by a military officer to his superior officer, and evidence given by him at a court-martial. (*Dawkins v. Rokeby, Lord*, L. R. 8 Q. B. 255, 268; 45 L. J. 68.) In all these cases and a few others, though the matter be ever so defamatory and false, the privilege is absolute and no action lies.

The distinction between absolute and qualified privilege.

Instances of absolute privilege.

The class of cases where a qualified privilege only arises is much more extensive, though the extent of the protection is not so great. "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter which without this privilege would be slanderous and actionable." (*Per Lord Campbell in Harrison v. Bush*, 5 E. & B. 344.) Thus it has been held that where any repre-

A definition of [qualified] privilege.

published by the defendant as a public journalist on the said —, and the said article was a fair and *bonâ fide* comment

Privilege.

sentation is made to a public officer, as the Postmaster-General, to obtain redress, a qualified privilege arises. (*Woodward v. Lander*, 6 C. & P. 548.) So words spoken in confidence and by way of advice, as where a servant's character is given, or where defamatory words are written or spoken *bonâ fide* with a view of investigating a fact in which the party is interested. (*Hopwood v. Thorn*, 8 C. B. 293.) So a substantially fair and correct, though not a verbatim report of judicial proceedings, whether published in a newspaper or a pamphlet (*Milnich v. Lloyd*, 46 L. J. 404); and it makes no matter though the hearing is before a Court which does not have jurisdiction. (*Usill v. Hales*, 3 C. P. D. 319; 38 L. T. N. S. 65; *Ryalls v. Leader*, L. R. 1 Ex. 296.) But a fair report of the proceedings at a meeting of a Board of Guardians where statements reflecting upon the plaintiff were made, is not privileged. (*Purcell v. Sowler*, 1 C. P. D. 781; 2 C. P. D. 215; 46 L. J. 308.) A communication which if made to the person to whom it was intended to be made would be privileged, is privileged although made to another person by a *bonâ fide* mistake. (*Tompson v. Dashwood*, 52 L. J. 425.)

Reports of proceedings at public meetings.

But with regard to fair and accurate reports of proceedings at public meetings a recent Act (the 44 & 45 Vict. c. 60, s. 2) has conferred a new privilege and protection upon *newspaper proprietors*. The following is the 2nd section: "Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose, and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit; provided always that the protection intended to be afforded by this section shall not be available as a defence in any proceeding if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared, a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor." This Act also provides that no *criminal* prosecution shall be commenced against any proprietor, publisher, or editor of a newspaper in respect of a libel in the newspaper without the *flat* of the Director of Criminal Prosecutions; but except the 2nd section already quoted, the Act has no reference to *civil* proceedings by action for libel.

A denial of the publication.

3rd. A third defence is that the defendant did not publish the alleged libel or slander. This is a fact to be determined by the jury. In addition to what has been already said on the subject of publication, the decision in *Parke v. Prescott* (L. R. 4 Exch. 169), may be mentioned. There it was held by three judges against two that where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes the language to some extent as his own, the man making the request is liable to an action as the publisher.

No defamatory meaning.

4th. Another defence is that the words used do not really have the defamatory meaning imputed to them. See *Mulligan v. Cole* (44 L. J. Q. B. 153; L. R. 10 Q. B. 549), where it was laid down an action will not lie in respect of words published if any ordinary reader would not understand them in a defamatory sense, and they cannot be made actionable by being alleged to bear a meaning which the evidence does not support.

Accord and satisfaction.

5th. Another that they do not apply to the plaintiff.
6th. Accord and satisfaction is a good defence if duly pleaded. In *Boosey v. Wood* (L. J. 34 Exch. 65), a defence that after the commence-

upon a matter of public and national interest, and it was printed and published *bonâ fide* and without malice, and for the benefit of the public and not otherwise.

2. *Claim in respect of a Libel contained in the Report of the Proceedings of a Public Meeting published in a Newspaper.*

1. The plaintiff was and is a physician and surgeon practising at K., in the county of C.

2. The defendants, who are the printers and publishers of a daily newspaper called the "M. C.," on the 30th of December, 1877, falsely and maliciously printed and published, of and

ment of the suit, the plaintiff and defendant agreed together to accept mutual apologies, to be published by them in their weekly journals in satisfaction of the right of action, and that these apologies were published accordingly, was allowed.

7th. Then there is a plea of the Statute of Limitation. In the case of libel the statute bars the remedy after the lapse of six years from the publication of the libel; but the sale of each copy of a libel being a separate publication, proof of the sale of a single copy within six years, rebuts a plea of the statute. (*Duke of Brunswick v. Harmer*, 14 Q. B. 185.) In the case of slander the statute runs in two years; but this important distinction must be borne in mind that where the slander is actionable in itself the time runs from the publication of the slander, but where the slander is only actionable because of special damage then this time runs from the happening of the damage.

The Statute of Limitation.

8th. Another defence, which, however, only applies in favour of the publishers of newspapers or other periodicals, is given by Lord Campbell's Act (the 6 & 7 Vict. c. 96). It provides that a publisher of a newspaper or periodical sued for a libel published therein, may plead that the libel was inserted without actual malice or gross negligence, that a full apology was made at the first opportunity, and that a sum of money has been paid into Court as amends. In such a case if the action proceeds and the jury find the allegations in the defence proved in favour of the defendant, a verdict is entered for him.

Defence of an apology under Lord Campbell's Act.

9th. Any defendant may pay money into Court in satisfaction of an action of a claim for libel, but by Order XXII. r. 1, he may not plead at the same time any denial of liability.

10th. In *Scott v. Sampson* (8 Q. B. D. 507; 51 L. J. Q. B. 380), the Queen's Bench intimated that general evidence of the reputation of a plaintiff might in an action for defamation be given in mitigation of damages *where his bad character was specially pleaded in the statement of defence*, but they decided that evidence of the existence of rumours to the discredit of the plaintiff, or even evidence of particular acts of misconduct, irrelevant to the libel in question, was not admissible. And now by Order XXXVI. r. 37: "In actions for libel or slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief with a view to mitigation of damages as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."

Mitigation of damages.

concerning the plaintiff, and of and concerning him in the way of his said profession, the words following, that is to say— [*Here set out verbatim all the alleged libellous words complained of, with innuendoes if necessary*], meaning thereby and imputing to the plaintiff that he had been guilty of gross misconduct in his profession of physician and surgeon, and acted in his said profession negligently, improperly, and with great cruelty.

Particulars of special damage :—

The following persons [*Here set out their names and addresses unless to do so would extend the particulars beyond three folios, in which latter case particulars must be delivered with the claim*] have in consequence ceased to employ the plaintiff in the way of his profession.

The plaintiff claims £500 damages.

Defence.

The defendants say :—

1. That the alleged libel formed part of the report of the proceedings of a public meeting lawfully convened for a public purpose and open to the public.

2. The said report is a fair and accurate report of such proceedings, and it was published by the defendants without any malice.

3. The publication of the said report was for the public benefit.

Reply.

1. The plaintiff joins issue upon the defence.

2. The plaintiff further says that after the publication by the defendants of the said libel and before action the defendants refused to insert in their said newspaper a reasonable letter explanatory of the statements made with regard to him at the said meeting, which the plaintiff forwarded to them and they received.

3. Claim for publishing a Libellous Letter.

1. On the 31st of May, 1877, the defendant falsely and maliciously published to one James Henry, of and concerning

the plaintiff, the words following, that is to say—[*Here follow the libellous words complained of, which in this case were contained in a letter which the defendant had received concerning the plaintiff and which he showed to James Henry*].

2. In consequence of the publication to him of the said letter the said James Henry, who was then in negotiation with the plaintiff with a view to his employment as manager of the Nitro-glycerine Company at a salary of £800 a year, refused to engage the plaintiff.

The plaintiff claims £1500 damages.

Defence.

1. The defendant denies that he published the said words, or that he published them maliciously.

2. If the defendant did publish the said letter the occasion of the publication was privileged. The said James Henry referred to in the statement of claim and the defendant are both interested in the said Nitro-glycerine Company, and when the said James Henry made inquiries of the defendant with reference to the plaintiff it was in answer to such inquiries that the publication of the alleged libel, if at all, took place.

3. The said words are true in substance and in fact.

4. The defendant does not admit the allegations contained in the 2nd paragraph of the statement of claim.

4. Claim for Damages and an Injunction for a Libel.

1. At all times material to this pleading the plaintiff was and now is a candidate for the office of a director of the Midland Railway Company.

2. On the 3rd of August, 1881, the defendant falsely and maliciously printed and published, of and concerning the plaintiff the words following, that is to say: "I hope the shareholders of the Company will understand their interests better than to elect Mr. Jones [meaning thereby the plaintiff]. He seeks the position from no desire to advance the interests of the Company, but to save his own bankrupt credit and to fill his exhausted purse at the expense of the company. A professional director like he [meaning the plaintiff] is knows how to turn his position into hard cash, and I have no doubt his

lean pockets will swell as the modest dividends of the Company shrink;" meaning thereby that the plaintiff was actuated by unworthy and sordid motives in his candidature, that he wished dishonestly and by improper means to enrich himself at the expense of the Company, that he was a person in bad credit and impoverished, and that he sought to restore his credit by pillaging the company.

3. The defendant is still publishing the said libel, and threatens to continue the publication of it.

The plaintiff claims :—

- (1) An injunction to restrain the defendant from repeating the publication of the said libel, or any libel upon the plaintiff.
- (2) £2000 damages.

Defence.

1. The defendant denies that the said words bear the meaning placed upon them by the plaintiff.

2. The defendant is a shareholder in the Midland Railway Company, and he has published the said alleged libel in the form of a circular, addressed and sent only to persons, who, like himself, are shareholders in the said Midland Railway Company, and have a common interest in securing the election to the directorate of trustworthy and fit persons. The said words were published without malice.

3. The defendant says that the said words are true in substance and in fact.

Reply.

The plaintiff joins issue upon the statement of defence.

5. *Statement of Claim in an Action for Slander, relying for the Cause of Action upon the Averment of Special Damage (a).*

1. In the month of July, 1880, the plaintiff was a candidate for admission to membership in the ——— Club.

2. On the 2nd of the said month the defendant falsely and maliciously spoke and published of and concerning the plaintiff the words following, that is to say—[*Here set out verbatim the*

(a) See *Chamberlain v. Boyd*, 11 Q. B. D. 407.

words of the slander—meaning thereby that the plaintiff had been guilty of ungentlemanly and dishonourable conduct, and that he was not a fit person to associate in any society of gentlemen, or to be a member of the said — Club.

3. In consequence of the publication of the said words, Sir W. R., and Lord H. M., and other persons, were deterred from voting for the repeal of one of the rules of the said — Club, which prevented the plaintiff being balloted for as a candidate for the said — Club.

The plaintiff claims £1000 damages.

Defence.

1. The defendant did not speak or publish the said words.

2. If he did, it was upon the premises of the said — Club, and only in the hearing of persons who, like the defendant, were members of the said — Club, and upon an occasion when the propriety of repealing or relaxing the rule referred to in the statement of claim was under discussion among the members of the said — Club. The said words were spoken without malice.

3. The said words were true in substance and in fact.

4. The defendant will object that the plaintiff has alleged no special damage sufficient to support the action.

6. Alternative Claim against two Defendants for Libel.

The plaintiff has suffered damage by the defendants, or one or other of them, falsely and maliciously printing and publishing of the plaintiff in relation to his profession of a clergyman of the Church of England, the words following, that is to say—[*Here follow the alleged libellous words*—meaning thereby that the plaintiff was slothful and careless in the discharge of his clerical duties, and was unfit to be a clergyman of the Church of England.

The plaintiff claims £800 damages.

Defence of the Defendant M. G.

1. The defendant denies that he falsely or maliciously or at all printed or published the words set forth in the statement of claim.

Defence of the Defendant C. G.

1. The defendant C. G. says that the alleged libel complained of by the plaintiff in his statement of claim was contained in a public newspaper called " — Gazette," and was inserted in such newspaper without actual malice or gross negligence.

2. The defendant C. G. further says that at the earliest opportunity after the commencement of this action, he inserted in such newspaper a full apology for the said libel.

3. He brings into Court the sum of £10 by way of amends for the injury sustained by the plaintiff by the publication of the said libel, and says that the said sum is enough to satisfy the claim of the plaintiff in respect thereof.

7. Action for Slander and Libel, the former in the French Language.

1. On the 1st of May, 1876, the defendant falsely and maliciously spoke and published of the plaintiff, in the French language, the words following, that is to say—[*Here follow the alleged defamatory words set out verbatim in French*]*—*which said words as translated into the English language bear, and were understood by the persons to whom they were published to bear the meaning following, that is to say—[*Here follows a translation of the words in English*].

2. The defendant meant thereby and imputed that the plaintiff at the time of the speaking of the said words was and had for a long time been suffering from a contagious disease, rendering him unfit to mix in society.

3. On the 5th of May, 1876, the defendant falsely and maliciously wrote and published in a letter addressed to one J. F., of and concerning the plaintiff, and of and concerning him in the way of his profession as a teacher of music, the words following, that is to say—[*Here set out the words in full*]*—*meaning thereby that the plaintiff was a man of dissolute habits and profligate life, and not fit for an appointment as music master in any academy for young ladies.

The plaintiff claims :—

- (1) £500 damages for the slander set out in the 1st paragraph.
- (2) £500 damages for the libel set out in the 3rd paragraph.

8. *Action for Slander of a Man in the way of his Trade.*

1. The plaintiff at the time of the grievance hereinafter mentioned was and still is a manufacturer of brushes and brooms, carrying on his business at —.

2. On or about the 1st of June, 1877, the defendant falsely and maliciously spoke and published of the plaintiff in relation to his said trade and business as aforesaid, the words following, that is to say: "You have got a commission to buy for that fellow H. (meaning thereby the plaintiff), who always lets his cheques go back. He (meaning the plaintiff) can pay for nothing. In fact, he never pays anybody. He is sued in all directions, and has had the bailiffs in his warehouse. Indeed, he never pays anybody until he is compelled, and his business will soon be shut up;" meaning thereby that the plaintiff as such trader had been guilty of fraudulent and dishonest practices, and that he was insolvent and unable to pay his just debts.

3. The said words were spoken and published in the hearing of Messrs. G. & Co., merchants, of L., and Mr. W., broker, of L.; and by reason of the speaking and publishing of the said words in their hearing the said Messrs. G. and Mr. W. refused to sell goods to the plaintiff on credit as they otherwise would have done, and to have any dealings or transactions with the plaintiff in the way of his trade and business, and the plaintiff thereby incurred damage and injury to his credit and otherwise.

The plaintiff claims £500.

9. *Defence alleging that the Words complained of were spoken by the Defendant as an Advocate in Defence of his Client.*

When the alleged words were spoken the defendant was a solicitor and as such solicitor was engaged in defending one A. B., who was charged with an offence before the stipendiary

magistrate having jurisdiction at B. The alleged words were spoken (if at all) while he was engaged as such advocate as aforesaid and in the capacity of advocate, and not otherwise.

Action against Husband for a Libel by his Wife—See "*Husband and Wife*," *post*.

10. *Claim in an Action for Slander of Title (a).*

1. The plaintiffs were at the times hereinafter mentioned and still are vocalists, and had been and were engaged to sing at the S. Music Hall, K., and also at the L. P. Music Hall, for reward.

2. On the 15th day of May, 1875, the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. W., the proprietor of the S. Music Hall, and of them as such vocalists, and of their engagement at the S. Music Hall, the words following, that is to say :—
 "January 15th, 1875.—E. W. Esq. My dear Sir,—Although I know it is quite unintentional on the part of the lady advertisers (meaning the plaintiffs), the advertisement attached at foot, if relied upon in every particular by proprietors engaging them, is calculated to lead such proprietors to incur the penalties under the Copyright Act in certain cases, as I hold the power of attorney over the performing rights of certain musical publications belonging to two houses therein named, who only have the copyrights vested in them, and a separate and distinct property never held by them. If all proprietors knew this it would be best ; but I have not time to apprise them. I remain yours truly, H. W. ;" meaning that the plaintiffs had no right to sing certain songs which they advertised themselves as about to sing at the said music hall.

(a) In the case of an action for slander of title the plaintiff must show that the words complained of were written or spoken (it does not matter which) (*Malachy v. Soper*, 3 N. C. 371) *maliciously*, that they were *false*, and that *actual damage* has ensued to something which is the plaintiff's property. (*Wren v. Wild*, L. R. 4 Q. B. 730 ; 38 L. J. Q. B. 327 ; *Hart v. Wall*, 46 L. J. 227 ; and the recent case of *Halsey v. Brotherhood*, 19 Ch. D. 386.) As to publishing without justification an untrue statement disparaging a man's goods, and thereby causing him special damage, see *West Counties Manure Co. v. Lawes Chemical Manure Co.* (L. R. 9 Ex. 218).

3. In consequence thereof, and of the publication of the said words, E. W. dismissed the plaintiffs from his service and terminated the said engagement at the S. Music Hall.

4. On the 19th day of January, 1875, the defendant falsely and maliciously wrote and published of the plaintiffs, in the form of a letter addressed to E. L., Esq., the proprietor of the L. P. Music Hall, and of them as such vocalists and their engagement at the said music hall, the words following, that is to say—[*Here followed the letter, which was to the same effect as the letter set out in paragraph 2*].

5. In consequence of the publication of these words, E. L. dismissed the plaintiffs from his service, and refused to employ them to sing at the said music hall.

The plaintiffs claim £100 damages.

Demurrage.

See Charter-party.

Demurrer (a).

Detinue (b).

1. *Claim in an Action of Detinue.*

The defendant detains from the plaintiff the plaintiff's goods and chattels, that is to say, a horse, harness, and gig.

(a) Demurrers are now abolished, and all the learning on the subject is now obsolete. "No demurrer shall be allowed," Order XXV. r. 1. See p. 77 for remarks on the procedure which has been substituted for demurrers.

(b) This action is for the specific recovery of goods, deeds, or writings detained from the defendant by the plaintiff (1 Chit. Pl. 121), and it lies for the wrongful detention whether the taking was in the first instance lawful or not. (*Ibid.*) It is sufficient to maintain this action if the plaintiff was entitled to the possession of the goods. (*Gledstane v. Hewitt*, 1 C. & J. 565; *Newton v. Beck*, 27 L. J. Ex. 272; *Olliver v. Olliver*, 31 L. J. C. P. 4.)

When an action for detinue lies.

The distinction between this action and trover is that the latter action only lies for damages for a conversion, and the goods themselves cannot (in theory) be recovered, though the effect of this distinction is really inappreciable in practice, as juries are usually directed by consent to give

Distinction between detinue and trover.

The plaintiff claims a return of the said goods and chattels, or their value, and £10 for their detention.

2. *Claim in an Action for Detinue against a Police Officer.*

The defendant detains from the plaintiff the plaintiff's goods and chattels, that is to say, one diamond ring and one diamond pin.

Distinction
between
detinue
and trover.

a verdict for damages greater than the value, with the condition that it be reduced to 40s. if the goods are restored. In detinue the plaintiff claims to have the specific goods restored as well as damages for their detention, and the judgment is that the plaintiff recovers the goods if they can be obtained from the defendant by the sheriff, and a certain sum fixed by the jury for their detention; and if the goods cannot be had, then a certain sum assessed by the jury as their value, besides damages for detention, with costs. Where several chattels are claimed in detinue the value of each should be assessed separately, as the defendant may return some of them but not others. (*Phillips v. Jones*, 19 L. J. Q. B. 374.)

If all or any of the goods are delivered up to the plaintiff after action brought, the plaintiff cannot have judgment as regards the goods so delivered; but he may have judgment for damages for their detention if damage has been sustained, and recover the residue of the goods, or their value, besides damages for their detention. (*Crossfield v. Such*, 22 L. J. Ex. 65.)

Provision
of C. L. P.
Act, 1854,
as to re-
peated dis-
tresses.

By 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854), s. 78, "The Court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattels, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel, upon paying the value assessed; and that if the said chattel cannot be found, and unless the Court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick till the defendant render such chattel; or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: Provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action." The option given by this section does not apply where at the trial the value has not been assessed. (*Chilton v. Carrington*, 24 L. J. C. P. 78.)

In *Bullock v. Dunlop* (46 L. J. Ex. 150; 2 Ex. D. 43), the plaintiff was tried and acquitted on a charge of stealing a diamond ring and pin. The defendant, a superintendent of police, into whose hands the ring and pin had come in the ordinary course, did not deliver the goods to the plaintiff, but within a reasonable time applied to a magistrate, under the 2 & 3 Vict. c. 71, s. 29, for an order as to how he was to dispose of the goods. The magistrate, after hearing evidence, adjourned the further hearing to a day not yet expired at the time of action brought. In action of detinue held that a defence based upon the above facts was an answer to the action.

Detinue is an action of tort within the County Courts Act, 1867. (*Bryant v. Herbert*, 47 L. J. 670; 3 C. P. D. 389.) By sect. 5 of that Act, a plaintiff in an action of *tort* was not entitled to his costs unless he recovered a sum *exceeding* £10; but now by the 45 & 46 Vict. c. 57, s. 4, he is entitled to his costs if he recovers not *less than* £10.

The plaintiff claims a return of the said goods and chattels or their value, and £50 for their detention.

Defence.

1. The plaintiff was charged with stealing the said goods and chattels mentioned in the statement of claim, and was ultimately acquitted of such charge.

2. Prior to his acquittal, the said goods and chattels were lawfully in the defendant's possession as a constable, and the defendant being ignorant as to who was the rightful owner thereof before the commencement of the suit and within a reasonable time of his becoming possessed of the said goods and chattels, made an application to a magistrate having jurisdiction in the matter to make an order for the delivery of the goods to the party who should seem to be the rightful owner thereof.

3. The magistrate heard the said application, and adjourned it to a day which has not yet expired.

4. The defendant as such constable as aforesaid in the performance of his duty and not otherwise, detained and still detains the said goods and chattels until an order has been made.

Reply.

1. The plaintiff joins issue upon the statement of defence.

2. The plaintiff will further object that the matter pleaded by the defendant constitutes no defence in law to this action.

3. Claim in an Action for Detinue with an Alternative Claim for the Conversion of the Goods.

1. The defendant detains from the plaintiff the plaintiff's goods and chattels, that is to say, a quantity of household furniture, full particulars of which (exceeding three folios in length) accompany this claim.

2. In the alternative the plaintiff says that he has suffered damage by the defendant refusing after demand to deliver up to him the goods and chattels mentioned in the 1st paragraph.

The plaintiff claims :—

- (1) The return of the said goods or their value, and £100 damages for their detention, or
- (2) £500 damages for their conversion.

Dilapidations.

See Clergymen—Landlord and Tenant.

Distress (a).

1. *Claim in an Action for Distress against Landlord where the Latter personally distrained.*

1. On the 3rd of May, 1882, the defendant made an illegal distress upon the plaintiff's premises, No. 5, Pentonville Street, Brighton.

The nature of the remedy by distress.

(a) Distress is one of the few cases where a man is allowed to right himself without calling in the aid of the law, and this somewhat anomalous privilege is conferred upon two classes of persons. An occupier of land has a right to distrain anything that he may find trespassing upon his land, and actually doing damage there, damage feasant as it is called; and a landlord has a right to distrain on all goods and chattels (with certain exceptions) to be found on the demised premises for arrears of rent. In both these cases the owner of the goods distrained can only get them back in one of two ways, either by paying the rent due or making amends for the trespass as the case may be, or by entering into a replevin bond conditioned to prosecute an action within a limited time, raising the question of the legality of the distress.

In entering into a replevin bond the party gives security both for the amount of damage done or rent due and also for the estimated costs of the action.

When distress for rent may be made.

In executing a distress great care is necessary to avoid any illegal act or irregularity. A distress for rent can only be made between sunrise and sunset (it is otherwise in the case of distress damage feasant). It cannot be made till the rent is actually in arrear, and as that is not till the end of the day on which it is due, in practice a distress cannot be made till the day succeeding the day it is payable. This rule, coupled with another, that the distress must be made during the continuance of the term, led to the result in the case of the last instalment of rent due on the determination of a term, that it could not be distrained for at all. But this injustice has been remedied by statute (the 8 Anne, c. 14), which provides that a landlord may distrain within six calendar months after the determination of the tenancy, provided (1) the tenant remain in possession, and (2) the landlord's reversion continues.

But though rent cannot be distrained for until it becomes due, if a tenant agrees to pay rent *in advance*, the rent is due within the meaning of this rule, and can be distrained for as soon as the time mentioned for

2. The defendant trespassed in the said premises, and removed and converted to his own use a pianoforte belonging to the plaintiff.

its payment in the agreement has arrived. Therefore, where a person covenanted to pay rent in advance, and he subsequently filed his petition for liquidation, and the trustee went into possession, and then an instalment of rent fell due in advance, it was held that the landlord was entitled to distrain for such rent. (*Ex parte Hale, in re Burns*, 1 Ch. D. 285; 45 L. J. Bank. 21.)

Where a tenant holds under an agreement for a lease merely, he holds under the same terms as if a lease had been actually granted, and if by the terms of the agreement the landlord is entitled to distrain for rent due in advance, the latter is justified in doing so. (*Walsh v. Lonsdale*, 21 Ch. D. 9 (C. A.).)

The Court, however, has power to restrain a landlord from exercising his legal right of distress "upon such terms and conditions as the Court shall think just." In *Shaw v. The Earl of Jersey*, 4 C. P. D. 120, 359, such an injunction was granted for a fortnight on the terms of the tenant bringing the rent into Court.

Again a distress as a rule can only be made on the demised premises. It will be illegal if made anywhere else except in the following cases: (1) The Crown may distrain anywhere; (2) if the landlord coming to distrain see the cattle on the land and the tenant before his face drives them off the land to avoid a distress, the landlord may follow and distrain; (3) by statute 11 Geo. 2, c. 19, a landlord is authorised within thirty days to follow goods that have been fraudulently or clandestinely removed to avoid a distress; and (4) by 11 Geo. 2, c. 19, a landlord may take and seize any of the tenant's cattle depasturing upon any common appendant or appurtenant to the demised premises.

In making a distress, if the landlord or his agent force an entrance, or break an outer door, or in fact enter except in the usual manner adopted by persons having access to the building, the distress is illegal.

The distress is also illegal if goods or chattels are seized which are exempt from distress. The general rule is that all personal chattels found on the demised premises at the time of the distress, whether the property of a tenant or a stranger, may be taken, but this rule is subject to the following exceptions: 1. Things annexed to the freehold, as fixtures. 2. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade, as materials sent to be made into cloth, cloth sent to a tailor to be made into a coat, corn sent to a miller to be ground, &c. 3. Things in actual use, as the tools a man is using, the watch he is wearing, the horse he is riding. 4. Animals *feræ naturæ*. 5. Goods in the custody of the law. 6. By the 34 & 35 Vict. c. 79, the goods of lodgers are protected from distress by the superior landlord. 7. Beasts that gain the land and sheep. 8. Instruments of husbandry. 9. The instruments of a man's profession or calling. 10. Growing crops. The four last classes of chattels are only conditionally privileged from distress; they may not be taken if any other distrainable chattels can be found; but in the last resort they are liable.

Where a distress is illegal either owing to the time, manner, or place of making it, or from the nature of the goods taken, the party distrained on has an action against the distrainer for damages. The same liability arises where a distress is made by the landlord, no rent being due, or after a tender of the rent, or after a former distress. In all these cases the distress is more than irregular, it is *illegal*, and the distrainer is a trespasser *ab initio*. He may sue the distrainer in trespass or trover;

Where distress must be levied.

Things absolutely and conditionally privileged from distress.

Distinction between illegal and irregular distress.

Particulars of damage :—

The value of the said pianoforte . £30 0 0

The plaintiff claims £100 damages.

Effect of
irregular
distress on
the rights
of the
parties.

and an averment of special damage will not be necessary to support his action. It has been decided that in such a case the measure of damages is the value of the goods seized, and no deduction can be allowed for any rent actually due (*Attack v. Bramwell*, L. J. 32 Q. B. 146); but under the present system no doubt a landlord sued for illegal distress could, by means of a counter-claim, set off any rent due to him.

An *irregular* distress is a very different thing, and the plaintiff requires to prove more to succeed in his action. An irregularity arises in a case where rent is really due, and a distress has been legally made in respect to the time, manner, place, and subject of the distress, but *afterwards* the landlord or his agent has been guilty of some irregularity in dealing with the distress, as where any irregularity is committed with regard to the appraisement and sale of the distress, or where the landlord remains an unreasonable time on the demised premises after the five days from the distress, at the end of which time the distress may be sold. Any irregularity of this and a similar kind does not render the distrainer a trespasser *ab initio*. (11 Geo. 2, c. 19, s. 19, altering the common law.) But the party aggrieved by such unlawful act of irregularity has, an action for any *special damage* which he may have suffered by reason of it. The distress remains good, but the party aggrieved may bring an action to recover anything he has actually lost in consequence of the irregularity, and in such a case he *must* allege in his claim special damage.

Excessive
distress :
question of
excess is
for jury.

Another action given to a person where goods have been distrained is an action for excessive distress, that is to say, for taking a greater quantity of goods than is necessary to satisfy the distress and costs. "When a landlord is about to make a distress, he is not bound to calculate very nicely the value of the property seized, but he must take care that some proportion is kept between that and the sum for which he is entitled to take it." It is a question for the jury whether the distress is excessive or not, and they may find that it is excessive, though the net proceeds of the sale did not actually amount to the rent due. (*Smith v. Ashforth*, L. J. 29 Ex. 259.)

Prior to the 46 & 47 Vic. c. 61, a landlord was entitled to distrain for six years' arrears of rent, and now, except in those cases which fall within it, he is still so entitled. See the 46 & 47 Vict. c. 61.

By the 11 Geo. 2, c. 19, s. 21, it is enacted that in all actions of trespass, or upon the case, against persons entitled to rents or services, their bailiffs or other persons, relating to any entry upon premises chargeable with such rents or services, or to any distress or seizure thereupon, it shall be lawful for the defendants to plead the general issue, and give the special matter in evidence, inserting in the margin of the plea the words "by statute." Under the new rules a defendant is still entitled to place on the record this plea, with this additional provision that the pleader must now, in addition to inserting in the margin of his plea the words "by statute," specify the year of the reign in which the Act of Parliament on which he relies was passed, and also the chapter and section of such Act, and specify whether such Act is a public or private Act. (Order XXI. r. 19.) "Under the plea of not guilty by statute the defendant may give in evidence that he entered the plaintiff's house under a warrant of distress for rent, and was forcibly turned out of possession, and that he thereupon re-entered, and broke open the door of the house, in order to seize the plaintiff's goods. Everything which

Defence.

1. At the time of the said distress the plaintiff was the defendant's tenant of the said premises, and there was due and owing and in arrear to the defendant the sum of £10 in respect of one half-a-year's rent.

2. The defendant entered into the said premises to distrain for the said rent, and the trespass complained of was in the due exercise of the defendant's right of distress.

Reply.

The plaintiff joins issue upon the statement of defence.

2. Claim against Landlord and Broker for Illegal Distress.

1. On the 30th of March, 1879, the defendant A. B., acting by the orders and directions of the defendant C. D., entered and trespassed on the plaintiff's premises, No. 17, Gray Street, Chelsea, and made an illegal distress therein.

2. A table, a sideboard, six chairs, and two beds, belonging to the plaintiff, were seized and removed by the defendant A. B., and subsequently sold by order of the defendant C. D., and they are wholly lost to the plaintiff.

The plaintiff claims £100 damages.

3. Claim in an Action against Landlord, and Broker for an Illegal and Irregular Distress.

1. On the 13th of September, 1880, the defendant A. B., acting by the orders and directions of the defendant C. D., entered and trespassed on the plaintiff's premises, No. 13, Wilton Street, Bedford, and made an illegal distress there,

he might lawfully do in order to make the distress is admissible in evidence under this plea. The plea puts in issue not only the matter of justification, but the tenancy and ownership of the goods." (Addison on Torts, 4th ed. 561. . . . *Eagleton v. Gutteridge*, 11 M. & W. 469; *Williams v. Jones*, 11 Ad. & E. 643.)

With regard to following and distraining upon goods which have been fraudulently removed, it was decided (*Gray v. Stait*, 11 Q. B. D. 668; 52 L. J. Q. B. 412, C. A.), that a landlord is not justified under 11 Geo. 2, c. 19, s. 1, in following and seizing, after the expiration of the tenancy, and after the tenant has given up possession, goods which have been fraudulently removed from the demised premises for the purpose of defeating the landlord's right to distrain for rent.

and seized and removed the following articles belonging to the plaintiff, viz.: —.

2. Both of the defendants were guilty of the following illegal and irregular acts in the carrying out of the said distress :

- (a) They failed to give the plaintiff any notice of the said distress as required by the statute ;
- (b) They failed to have the goods and chattels distrained appraised by two sworn appraisers before selling the same ;
- (c) They did not properly advertise the said sale.

3. By reason of the irregularities mentioned in the 2nd paragraph the said goods and chattels sold for a much less sum than they would otherwise have realised and they were worth, and the plaintiff was prevented from attending the sale and purchasing them.

The plaintiff claims £150 damages.

Defence of both Defendants.

By Statute
11 Geo II.
c. 19, s. 21
(Public
Statute).

To the plaintiff's statement of claim the defendants say they are not guilty by statute.

4. Claim for Illegally Distraining upon other than the Demised Premises.

1. On the 5th of August, 1882, the defendant, accompanied by several other persons, broke and entered the plaintiff's premises, No. 16, Queen Street, Chatham, and seized and removed a number of articles of household furniture, the property of the plaintiff.

2. On the 11th of the said August the defendant caused the said articles to be sold, and he has applied the proceeds to his own use.

Particulars of the goods seized :—

[*Here set out a list of the articles seized.*]

The plaintiff claims £50, the value of the said goods, and £50 damages.

Defence.

1. The plaintiff was, on the said 5th of August, 1882, tenant of the defendant's house, No. 3, Grainger St., Chatham, and there was then due and owing to the defendant, in respect of arrears of rent for the said premises, the sum of £35.

2. On the said 5th of August, 1882, the plaintiff fraudulently and clandestinely removed the goods and chattels, mentioned in the statement of claim from No. 3, Grainger Street, where they then were, to No. 16, Queen Street, Chatham, in order to prevent the defendant distraining upon them for the said rent.

3. Whereupon the defendant in the day-time entered the plaintiff's said house, No. 16, Queen Street, and distrained for the said arrears of rent the said goods and chattels which had been so fraudulently removed, which is the grievance complained of.

5. *Claim for Distraining a Pony, and Defence that it was Trespassing.*

1. On the 1st of January, 1879, the defendant unlawfully seized, and for several days kept possession of, a pony belonging to the plaintiff.

2. The defendant refused to deliver up the said pony to the plaintiff until he paid the sum of £2, which the plaintiff ultimately did on 5th of January, 1879, under protest.

The plaintiff claims :—

- (1.) £20 damages for the seizure and detention of the said pony; and
- (2.) A return of the said £2.

Defence.

1. The defendant, on the said 1st of January, 1879, was possessed of a close of land called "Bryanstyes," in the parish of Keet, in the county of Rutland.

2. On the said 1st of January the plaintiff's pony mentioned in the statement of claim was trespassing on the said close of land and doing damage thereon.

3. Whereupon the defendant seized the said pony by way of

distress for the said damage, and drove it to a common pound and there impounded it, which is the grievance complained of.

4. The plaintiff paid the £2 mentioned in the statement of claim to the defendant in satisfaction of the damage done by the said pony and not under protest.

Reply.

The plaintiff joins issue upon the defence.

Easement (a).

1. Claim by Owner and Occupier of Premises for threatened Obstruction of Light to his Windows, claiming an Injunction.

1. The plaintiff is the owner and occupier of a house, 700, Regent Street, London, in which are the following ancient lights:—

(1.) The kitchen window in the basement on the south side ;

Material
averments
in an action
for dis-
turbance of
an ease-
ment.

Instances
of ease-
ments.

(a) A person may maintain an action for the disturbance of any easement which he may possess ; and in that case the material averments in his statement of claim will be :—1st. That he is the owner or occupier of a particular messuage or house. 2ndly. That as such he is entitled to a particular easement over the land of another, whether a right of way, of watercourse, of light and air, or whatever it may be. And 3rdly. That the defendant has in some way obstructed it, and so damaged the plaintiff. Easements can be acquired either by custom, grant (express and implied), or by prescription, whether under the Prescription Act, by immemorial user at common law, or by the fiction of a lost grant. (See on this subject the title, "Trespass to Land," *post*.)

In *Wood v. Hewett* (8 Q. B. 913), it was held a person might have an easement to have a hatch in another man's soil ; in *Lancaster v. Br* (5 C. B. N. S. 717), the easement established was a right to have a pile fixed in the waterway of the Thames ; in *Hoare v. The Metropolitan Board of Works* (L. R. 9 Q. B. 296), the easement was in having a signboard supported by a pole fixed in the common soil of which was vested in the defendants. In *Moody v. Steggles* (12 Ch. D. 261 ; 48 L. J. Ch. 639), the plaintiff, the owner of a publichouse, claimed a right to affix a signboard to the wall of the defendant's house, and upon proof that the signboard had stood for forty years, Fry, J., held that the easement claimed was a legal one, and a grant of it by the defendant's predecessors in title to the plaintiff's predecessors in title must be presumed. See also *Francis v. Hayward*, 20 Ch. D. 773. On the other hand in *Sturges v. Bridgman* (11 Ch. D. 853), the Court of Appeal held that a right to make a noise so as to annoy a neighbour cannot be supported by user unless during the period of user the noise has amounted to an actionable nuisance.

In *Dalton v. Angus* (6 App. Cases, 740 ; 50 L. J. Q. B. 689 ; 44 L. T. 844 ; 30 W. R. 191), it was finally settled after much discussion that a right to

- (2.) The two back dining-room windows on the ground-floor on the south side ;
- (3.) The landing window and back drawing-room window on the south side.

lateral support from adjoining land may be acquired by twenty years uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time ; and it is so acquired if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. See also *Bell v. Luce*, 10 Q. B. D. 547. Easement of support.

"Water is *publici juris* in this sense only, that all may reasonably use it who have the right of access to it. No man can have any property in the water itself except in that particular portion which he may choose to abstract from the stream, and take into his own possession, and that during the time of his possession only. The proprietor of the adjacent land has the right to the use of the streams which flow through it not as an absolute and exclusive right to the flow of all the water in its natural state, but subject to the similar rights of all the proprietors of the banks on each side to a reasonable enjoyment thereof." (*Embrey v. Owen*, 20 L. J. Ex. 212 ; 6 Exch. 353.) The rights of a riparian proprietor over the water of a natural stream is limited to the reasonable use of it as it passes through his land, and he is bound to allow it to pass on to the lower proprietors without any real diminution of its volume or any deterioration of its quality. If he pollutes it or abstracts any substantial part of it he is liable to the lower proprietors for any damage caused to them, and equally if he impedes the progress of the stream and causes it to back water on to the land of a proprietor higher up he is liable in damages, unless in any or all these cases he can show that by express grant or by user he has gained an easement or right to do the particular act complained of. (*Mason v. Hill*, 5 B. & Ad. 1.) Rights of water.

A riparian owner cannot, except as against himself, confer on any one who is not a riparian owner any right to use the water of the stream, and any user by a non-riparian proprietor, even under a grant from a riparian owner, is wrongful if it sensibly affects the flow of the water by the lands of other riparian proprietors. (*Ormerod v. Todmorden Joint Stock Mill Co.*, 11 Q. B. D. 155, C. A.)

The Prescription Act, 2 & 3 Will. 4, c. 71, s. 2, applies to watercourses as well as ways and other easements, and under it a user by the party claiming the easement for the times specified in the section, viz., twenty and forty years gives a good title under the statute. But the title to easements given by the Prescription Act is in addition to and not in substitution of the old common law titles, and a person may still claim an easement, basing his title upon the fiction of a lost grant or an immemorial user. The practice, where it is necessary in a pleading to set out the grounds of the title, is to claim the easement in all the ways in which it can be acquired, viz., under the statute, under the fiction of a lost grant, and by immemorial user. How acquired.

A right to discharge the refuse of dye works into a stream is an easement which may be acquired under sect. 2 of the Prescription Act as well as at Common Law (*Crosley v. Lightowler*, L. R. 2 Ch. 478) ; so is the right to cast the refuse of mining operations into a natural stream. (*Carlton v. Loeving*, 26 L. J. Ex. 251 ; 1 H. & N. 784.)

Every grantee of a right of way or watercourse to be exercised over and through the land of the grantor must himself repair the way if he desires to have it repaired and kept in repair for his own use, or if repairs

The plaintiff claims a return of the said goods and chattels, or their value, and £10 for their detention.

2. *Claim in an Action for Detinue against a Police Officer.*

The defendant detains from the plaintiff the plaintiff's goods and chattels, that is to say, one diamond ring and one diamond pin.

Distinction
between
detinue
and trover.

a verdict for damages greater than the value, with the condition that it be reduced to 40s. if the goods are restored. In detinue the plaintiff claims to have the specific goods restored as well as damages for their detention, and the judgment is that the plaintiff recovers the goods if they can be obtained from the defendant by the sheriff, and a certain sum fixed by the jury for their detention; and if the goods cannot be had, then a certain sum assessed by the jury as their value, besides damages for detention, with costs. Where several chattels are claimed in detinue the value of each should be assessed separately, as the defendant may return some of them but not others. (*Phillips v. Jones*, 19 L. J. Q. B. 374.)

If all or any of the goods are delivered up to the plaintiff after action brought, the plaintiff cannot have judgment as regards the goods so delivered; but he may have judgment for damages for their detention if damage has been sustained, and recover the residue of the goods, or their value, besides damages for their detention. (*Croasfield v. Such*, 23 L. J. Ex. 65.)

Provision
of C. L. P.
Act, 1854,
as to re-
peated dis-
tresses.

By 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854), s. 78, "The Court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattels, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel, upon paying the value assessed; and that if the said chattel cannot be found, and unless the Court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick till the defendant render such chattel; or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: Provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action." The option given by this section does not apply where at the trial the value has not been assessed. (*Chilton v. Carrington*, 24 L. J. C. P. 78.)

In *Bullock v. Dunlop* (46 L. J. Ex. 150; 2 Ex. D. 43), the plaintiff was tried and acquitted on a charge of stealing a diamond ring and pin. The defendant, a superintendent of police, into whose hands the ring and pin had come in the ordinary course, did not deliver the goods to the plaintiff, but within a reasonable time applied to a magistrate, under the 2 & 3 Vict. c. 71, s. 29, for an order as to how he was to dispose of the goods. The magistrate, after hearing evidence, adjourned the further hearing to a day not yet expired at the time of action brought. In action of detinue held that a defence based upon the above facts was an answer to the action.

Detinue is an action of tort within the County Courts Act, 1867. (*Bryant v. Herbert*, 47 L. J. 670; 3 C. P. D. 389.) By sect. 5 of that Act, a plaintiff in an action of tort was not entitled to his costs unless he recovered a sum exceeding £10; but now by the 45 & 46 Vict. c. 57, s. 4, he is entitled to his costs if he recovers not less than £10.

The plaintiff claims a return of the said goods and chattels or their value, and £50 for their detention.

Defence.

1. The plaintiff was charged with stealing the said goods and chattels mentioned in the statement of claim, and was ultimately acquitted of such charge.

2. Prior to his acquittal, the said goods and chattels were lawfully in the defendant's possession as a constable, and the defendant being ignorant as to who was the rightful owner thereof before the commencement of the suit and within a reasonable time of his becoming possessed of the said goods and chattels, made an application to a magistrate having jurisdiction in the matter to make an order for the delivery of the goods to the party who should seem to be the rightful owner thereof.

3. The magistrate heard the said application, and adjourned it to a day which has not yet expired.

4. The defendant as such constable as aforesaid in the performance of his duty and not otherwise, detained and still detains the said goods and chattels until an order has been made.

Reply.

1. The plaintiff joins issue upon the statement of defence.

2. The plaintiff will further object that the matter pleaded by the defendant constitutes no defence in law to this action.

3. Claim in an Action for Detinue with an Alternative Claim for the Conversion of the Goods.

1. The defendant detains from the plaintiff the plaintiff's goods and chattels, that is to say, a quantity of household furniture, full particulars of which (exceeding three folios in length) accompany this claim.

2. In the alternative the plaintiff says that he has suffered damage by the defendant refusing after demand to deliver up to him the goods and chattels mentioned in the 1st paragraph.

2. The defendant has erected a building which has materially diminished the access of light and air through the said windows, and rendered the plaintiff's house almost unfit for habitation.

The plaintiff claims an injunction commanding the defendant to pull down the said building, and also damages for the said loss and inconvenience he has endured.

Defence.

1. The defendant denies that the lights mentioned in the statement of claim, or any of them, are ancient lights.

2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.

3. *Claim by Lessee for Obstruction of Light and Air, alleging his Title by an Express Grant, and by Prescription.*

1. The plaintiff is the lessee and occupier of a shop and warehouse No. 17, Cheapside, in the city of London, in which are the following ancient lights :—

- (1.) On ground-floor, one shop window facing north ;
- (2.) On first floor, two warehouse windows facing north ;
- (3.) On second floor, two warehouse windows facing north.

2. The plaintiff is also entitled to an uninterrupted access of light and air through the said windows by an express grant made under the hand and seal of the defendant on the 30th of July, 1867.

3. The defendant has erected a building which has materially diminished the access of light and air through the said windows on the ground and first floors, and he is now proceeding with the erection of another building which will further impede the access of light and air to the said windows, and will materially diminish its access to the said windows on the second floor.

both the lands. Thus, if a man is seised in fee of the dominant tenement, but has only a life interest or a leasehold interest in the servient tenement, or *vice versa*, then the easement is not extinguished. In such a case it is suspended merely, and upon the severance of the two estates it will revive. An important distinction consists herein between the cases where an easement is suspended and where it is extinguished.

The plaintiff claims :—

- (1.) An injunction commanding the defendant to pull down and remove the building which diminishes the access of light and air to the windows on the ground and first floors ;
- (2.) An injunction to restrain the defendant, his contractors, servants and workmen, from continuing the erection so as to obstruct or diminish the access of light to the said windows on the second floor, or any of them ;
- (3.) Damages.

Defence.

1. None of the plaintiff's said lights are ancient.
2. The defendant did not make the grant mentioned in the 2nd paragraph of the statement of claim.
3. The defendant denies that he ever erected any building which has materially, or at all, diminished the access of light and air through any of the plaintiff's said windows.
4. The defendant is not now proceeding with the erection of any building which will materially, or at all, diminish the access of light and air to the plaintiff's said other windows on the second floor.
5. The defendant further says, with reference to the allegation that he, by his buildings, has materially diminished the access of light and air to the plaintiff's windows in the ground and first floors that he erected the said buildings under the express leave and licence of the plaintiff given to him by writing on the 10th of February, 1878, and that, acting upon such leave and licence, he has expended large sums of money in erecting the said buildings, which is the grievance complained of.

Reply.

The plaintiff joins issue upon the defence.

4. Claims by Owner and Occupier of a Farm for an Obstruction of a Right of Way.

1. The plaintiff is the owner in fee simple, and the occupier, of two farms in Breconshire, called T. and G.

2. The plaintiff and his tenants, occupants for the time being of the said farms of T. and G., is and are entitled to a right of foot, horse, and carriage-way, along a road which passes from the said farm of T. to the said farm of G. through two closes of land belonging to the defendant, called G. close and M. close.—

- (a. By grant from a predecessor title of the plaintiff to a predecessor in title of the defendant made on the 30th of July, 1894 :
- (i.) By a lost grant :
- (c. By immemorial user :
- d. Under the Prescription Act 2 & 3 Will. 4 c. 71. s. 2

3. The defendant has obstructed the plaintiff's enjoyment of the said right of way and he threatens that he will continue to prevent and obstruct it.

The plaintiff claims :—

- (1. An injunction restraining the defendant, his agents or servants from obstructing the plaintiff's use and enjoyment of the said right of way :
2. Damages.

Issues.

1. The defendant denies that the plaintiff or his said tenants is or are entitled to any right of carriage way as alleged, either by virtue of an express grant or in any other of the modes claimed.

2. Upon the occasions referred to in the 4th paragraph of the statement of claim the defendant was asserting and claiming to exercise a right of carriage way for horses and carts through the defendant's said closes. The defendant did then obstruct and threatens further to obstruct any attempt by the plaintiff to pass with horses and carts or carriages through and over his said closes.

Reply.

The plaintiff joins issue upon the defence.

5. Claim by Owner and Tenant of Public-house, claiming an Easement to have a Sign-board on an Adjoining House.

1. The plaintiff A. B., as owner in fee, and the plaintiff C. D., as lessee for a term of years of the "Red Lion" inn, in L., have suffered damage by the defendant unlawfully pulling down a sign-board, the property of the plaintiff A. B., affixed to the side wall of the defendant's house at L.

2. The plaintiffs, as incident to their ownership and tenancy of the said "Red Lion" inn, are entitled to have the said sign-board affixed to the side wall of the defendant's house,—

- (a.) By an immemorial use of the right of having the sign-board there ;
- (b.) By lost grant ;
- (c.) Under the provisions of the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2.

The plaintiffs claim :—

- (1.) An injunction commanding the defendant forthwith to restore the said sign-board ;
- (2.) Damages.

Defence.

1. The plaintiffs are not, nor is either of them, entitled to any right of affixing and keeping the said sign-board upon the side wall of the defendant's house under or by any of the titles alleged, or at all.

2. The defendant will also object that in law no such easement as that claimed can be acquired under the Prescription Act, 2 & 3 Will. IV. c. 71, s. 2.

Reply.

The plaintiff joins issue upon the defence.

6. Claim for Obstruction of a Water-course, alleging that it is a Natural Watercourse, and alternatively claiming an Easement.

1. The plaintiff is the owner and occupier of a farm called A. Farm, in the county of B., and the defendant is the owner and occupier of certain land adjoining thereto and on a lower level.

2. A natural water-course called the Eelbeck flows through the plaintiff's said farm and then through the defendant's land.

3. In the alternative the plaintiff says that in and prior to the year 1850, one T. D. was owner in fee both of the plaintiff's farm and of the defendant's lands, and the water in and upon the lands now of the plaintiff had flowed for a long period of time before the year 1850 and was then flowing from the farm now of the plaintiff, by means of an open ditch or water-course through the land now of the defendant, and had been carried away from the plaintiff's said lands by means of the said ditch or water-course.

4. In the year 1850, the said T. D. sold and conveyed the said farm to a predecessor in title of the plaintiff, and he subsequently sold and conveyed the said lands to the defendant.

5. The plaintiff says he is entitled to have the water on his said farm flow from his farm by means of the said ditch or water-course, and so to be carried away from the said farm under the following titles:—

- (1.) By reason of an implied grant, created on the sale and conveyance of the field, as mentioned in paragraph 4.
- (2.) By reason of the enjoyment thereof as of right and without interruption for 20 years before this action by the occupiers of the plaintiff's farm.
- (3.) By reason of a lost grant.

6. On the 10th of June, 1880, the defendant obstructed the flow of the said water down and through the said water-course, and he has since filled it up with earth and stone, by reason of which the water flowing from the plaintiff's farm was back-watered upon his lands and has done him damage.

The plaintiff claims:—

- (1.) £500 damages;
- (2.) An injunction commanding the defendant forthwith to remove the obstruction to the flow of the said water down and along the said water-course.

Defence.

1. The said alleged water-course is not a natural stream.
2. The defendant does not admit that while T. D. was owner

of the plaintiff's said farm and the defendant's said land the water from the plaintiff's farm flowed therefrom into the defendant's land as alleged, or at all.

3. The defendant says that the said T. D. sold and conveyed the said lands to the defendant prior to his sale and conveyance of the said farm to the predecessor in title of the plaintiff.

4. The defendant denies that the plaintiff is entitled to the right claimed by him by any one of the titles mentioned in the 5th paragraph, or at all.

7. *Claim of a Right to send Water through a Neighbour's Drain (a).*

1. On the 13th of January, 1875, one William Smith was the owner of 12, Clinton Street, Newcastle-on-Tyne, and also of the house adjoining, No. 13, Clinton Street.

2. At that time, and for some considerable time before, the tenants of No. 12, Clinton Street, had been accustomed to send the refuse water from the said premises down and along a drain which emptied itself into the drain belonging to No. 13, Clinton Street, and so into the main sewer.

3. On the 13th of January, 1875, the said William Smith sold and conveyed the said house, No. 12, Clinton Street, to the plaintiff, and a week later he sold and conveyed No. 13, Clinton Street, to the defendant.

(a) On a grant of part of a tenement or of one of two adjoining tenements belonging to the same grantor there passes to the grantee all continuous and apparent easements over the lands retained by the grantor, that is to say, all such easements as are necessary to the reasonable enjoyment of the property granted, and have in fact been enjoyed during the unity of ownership. In the above statement of claim and the preceding one, the plaintiff bases his title upon this principle of law; the extent of and limitations to the doctrine of which were exhaustively discussed in the recent case of *Wheeldon v. Burrows*, 12 Ch. D. 31; 48 L. J. Ch. 853 (C.A.). In that case in which the general proposition that a grantor impliedly grants all continuous and apparent easements was affirmed, the distinction between an implied *grant* and an implied *reservation* was taken, and it was laid down in accordance with previous decisions (1) that if the grantor wishes to *reserve* to himself any easement over the house or lands granted he must do so expressly, except in the case of a way of necessity, and (2) that if a grantor fails expressly to reserve any easement and subsequently alienates the land he retained, a purchaser taking under him has no title to any continuous or apparent easement over the lands first granted. The case of *Pyer v. Carter*, 11 H. & N. 916; 26 L. J. Exch. 258, to the contrary is now discredited. See generally on this subject, *White v. Bass*, 7 H. & N. 722; 31 L. J. Ch. 283; *Suffield v. Brown*, 4 De Gex & S. 185; 33 L. J. Ch. 249; *Swansborough v. Coventry*, 9 Bing. 305; 2 L. J. C. P. 11; *Watson v. Troughton*, 48 L. J. 508.

Continuous and apparent easements.

4. On the 20th of July, 1875, the defendant took up and removed the said drain belonging to No. 13, Clinton Street, and so obstructed and prevented the flow of the plaintiff's refuse water as it had been accustomed to flow, and caused the plaintiff damage.

8. *Claim by Owner of a House to an Easement of Support from the Soil of adjoining Owner.*

1. The plaintiff is the owner and occupier of a dwelling-house at A., and the defendant is the owner of a close of land immediately adjoining.

2. From time immemorial, or, in the alternative, for more than twenty years next before the commencement of this action, the plaintiff's said house has been supported by the soil of the defendant's said close.

3. On the 3rd of October, 1880, the defendant excavated and removed a considerable portion of the said soil, whereby the house fell, and the plaintiff has suffered damage.

Particulars of damage :—

[*Set them out briefly.*]

The plaintiff claims £ damages.

Ejectment.

(See *Recovery of Land*.)

Executors and Administrators (a).

Action by Executors on Promissory Notes, and for Money lent by the Testator.

1. The plaintiffs are the executors of A. B., deceased.
2. The plaintiffs' claim is against the defendant as maker of

(a) The following is a brief outline of the law affecting executors and administrators, so far as it comes within the scope of this work :
Contracts.—Contracts with a testator having reference to his real estate pass with the reversion where the testator's interest was only of a

When executors, &c.,

a promissory note for £350, dated November 27, 1883, payable four months after date, to A. B., or his order.

Particulars :—

Principal	£350	0	0
Interest	10	0	0
Amount due	£360	0	0

3. On November 30, 1883, A. B. lent £70 to the defendant. The plaintiff claims £360, and £70, and interest, until payment or judgment.

chattel nature to his executors or administrators; and those of a similar kind having reference to the freehold, pass to the heir-at-law or devisee. Covenants running with the land always go to the heir or devisee. There is this important distinction between the two cases of freeholds and leaseholds, that in the case of the testator's chattels real, if he has not himself sued for breaches of covenant affecting them, the personal representatives cannot sue unless on account of some distinct injury to the testator's personal estate. But see *Raymond v. Fitch*, 2 C. M. & R. 558. The effect of *Raymond v. Fitch* would seem to be that unless the covenant be one on which the heir or devisee alone can sue for a breach of the covenant in the lifetime of the testator, the executor can sue unless it is a personal contract to which the axiom *actio personalis moritur cum persona* applies. (*Ricketts v. Weaver*, 12 M. & W. 718.) Williams on Executors, p. 814. In other cases the heir or devisee can sue only in respect of breaches after the testator's death. (*Kingdon v. Nottle*, 1 M. & S. 355; *Jones v. King*, 4 M. & S. 188.)

Personal contract with testators may always be sued on by the personal representatives in respect of damages accruing to the personal estate by reason of the breach, whether such breach has occurred before or after the testator's death. With regard to contracts which affect the testator personally only, such as a contract to marry, the personal representatives, cannot sue unless there is some special damage to the estate. (*Chamberlain v. Williamson*, 2 M. & S. 408.) Where a passenger sustained personal injury through the breach by the defendants of their contract to carry him with due care, of which injury he ultimately died, it was held that his executors might sue for the injury to his estate in respect of medical expenses thereby incurred, and loss by reason of his being prevented before his death from attending to his business. (*Bradshaw v. Lancashire & Yorkshire Rail. Co.*, L. R. 10 C. P. 189; 31 L. T. N. S. 847; 44 L. J. C. P. 148.) And it was held that the executor of a person may sue in respect of a similar contract made by such person with regard to his wife, whereby he sustained like damage. (*Potter v. Metropolitan District Rail Co.*, 32 L. T. N. S. 36.) If, however, the contract were of such a nature as to be rescinded by the death, no subsequent breach would be possible, but the right of action for any breach which accrued before death is not thereby divested. (*Stubbs v. Holywell Rail. Co.*, L. R. 2 Ex. 311.) But in similar cases where no contract intervenes the action cannot be maintained. (*Pulling v. G. E. Rail. Co.*, 9 Q. B. Div. 110.) As to when a contract is rescinded by death, see Chitty on Contracts, 10th ed., p. 95; Addison on Contracts, 7th ed. p. 291.

If the cause of action arose in the testator's lifetime, the personal re-

may sue on contracts of testator, &c.

Executors, &c., cannot sue on merely personal contracts, unless the estate has been depreciated.

In what

Action by Executor under Lord Campbell's Act for Negligence causing the Death of the Deceased.

1. The plaintiff, as executor of C. D., deceased, brings this action for the benefit of Eva, the wife, and William and Mar-

capacity
the execu-
tor, &c.
must sue.

presentative must sue in his character as such (2 Wms. Exors., 7th edit. 870); but if the cause of action arose altogether after the testator's death, the personal representative may sue personally or as executor. (*Ib.* 876, 1870.) Thus, where an administrator after the death of an intestate enters into contracts in the course of carrying on the business of the intestate for the benefit of the estate, he may sue in his representative capacity, or *scilicet* in his individual capacity. (*Moseley v. Rendell*, L. R. 6 Q. B. 338; *Abbot v. Parfitt*, *Ib.* 346, explaining *Bolingbroke v. Kerr*, L. R. 1 Ex. 222, where it did not appear that the business was carried on for the benefit of the estate.)

If, however, the assets to be recovered would belong to the personal estate, he can only sue as executor, &c. (*Aspinall v. Wake*, 10 Bing. 51.)

The evi-
dence of
their title.

Administrators cannot sue until they have obtained letters of administration, as they are their only authority for instituting the suit. An executor, however, may sue before the grant of probate; but he must obtain probate in order to sustain his title on the trial, should it be disputed.

Actions for
personal
injuries
generally
die with
the person.

[*Actions in the case of torts.*—The rule *actio personalis moritur cum persona*, applies to torts to the person, viz., assault, battery, false imprisonment, libel and slander. With regard to actions for negligence causing death, Lord Campbell's Act (9 & 10 Vict. c. 93), ss. 1 and 2 provides that in such cases (if the act of negligence would have been actionable if death had not resulted), the person responsible for such act shall be liable to an action for the benefit of the wife, husband, parent, and child, to be brought by the executor or administrator of the deceased person, and the jury are to apportion the amount of their verdict among the relatives above named. By s. 3, actions are to be commenced within twelve months from the death; and by s. 4, particulars of the persons on whose behalf the action is brought and of the nature of the claim are to be delivered to the defendant or his solicitor with the declaration (now statement of claim).]

Exception.
Lord Camp-
bell's Act.

By 27 & 28 Vict. c. 95, if the executor or administrator does not bring the action under Lord Campbell's Act within six months after the death, the persons for whose benefit he might have brought the action may themselves bring it.

It has been held under this Act, that where a servant was killed in the employment of his master, the latter is not liable for negligence for which the servant could not, before the passing of the Act, have sued him. (*Senior v. Ward*, 28 L. J. Q. B. 139.)

A bastard child cannot sue under this Act. (*Dickinson v. N. E. Rail. Co.*, 2 H. & C. 735.)

Decisions
on Lord
Campbell's
Act.

In estimating damages under the Act, the reasonable expectation of pecuniary advantage which the surviving relatives had from the deceased, and the probable loss in money sustained by his death, are to be taken into account; but funeral and testamentary expenses are not to be included. (*Dalton v. South Eastern Rail. Co.*, 4 C. B. N. S. 296; 27 L. J. C. P. 227; *Pym v. Great Northern Rail. Co.*, 4 B. & S. 496; 31 L. J. Q. B. 249.) There must be some actual pecuniary damage to the parties on behalf of whom the action is brought proved, and a verdict for even nominal damages is not allowable where no actual damage

garet, and Dorothea, the children of C. D., who have suffered damage from the defendant's negligence in carrying the said

is proved, merely because death by negligence is established. (*Duckworth v. Johnson*, 29 L. J. Ex. 25.)

There are two other classes of torts to be considered, viz., injuries to the real estate of persons deceased, and injuries to their personal estate.

With regard to injuries to the real estate, the 3 & 4 Will. 4, c. 42, provides (sect. 2), "that an action may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed by such person within six calendar months before his death, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate. Either under that statute, or under 4 Edw. 3, c. 7, an action for injury to chattels real would lie.

Injuries to real estate of testator;

With regard to injuries to the personal estate, an action was given to executors and the executors of executors, by the joint effect of 4 Edw. 3, c. 7, and 25 Edw. 3, c. 5, and to administrators, upon their institution, by the 31 Edw. 3, c. 2. It must be shown that the injury caused the estate of the deceased to be less beneficial to the plaintiff. But none of the authorities go so far as to say that where the cause of action is in substance an injury to the person, the legal personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. Thus where A. sued as the administratrix of B., who was run over by the defendants' engine at a level crossing, and injured, and compelled to incur medical expenses, so that his estate was diminished in value, the action was held not maintainable. (*Pulling v. Great Eastern Rail. Co.*, 9 Q. B. Div. 110.) It will be observed, on a reference to the report, that the facts did not bring the case within 9 & 10 Vict. c. 93.

to personal estate.

ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

In the case of contracts.—Personal representatives are, generally speaking, liable on contracts made by the testator for breaches, whether before or after death (*Wollaston v. Hakewill*, 3 M. & G. 320; *Wilson v. Wigg*, 10 East, 313); but contracts for personal services are, as a general rule, rescinded by death, except so far as for past breaches. (*Werner v. Humphrys*, 2 M. & G. 853; *Schoni v. Kirkman*, 1 M. & W. 418; and see *Stubbs v. Holywell Rail Co.*, L. R. 2 Ex. 311, 312.) An executor or administrator may be sued, *as such*, for goods sold to him or work done at his request, or for money received by him for the use of the plaintiff; and he may also be, where the contract is entered into by him as executor or administrator, sued on such claims in his own right. (*Cornner v. Shaw*, 3 M. & W. 350.) Executors may be sued for money due on accounts stated as executors, and money paid at their request as executors. (*Ashby v. Ashby*, 7 B. & C. 444; *Furhall v. Furhall*, L. R. 7 Ch. 123.)

To what extent personal representatives are liable on the contracts of the deceased.

Before the Judicature Acts came into force an executor could not be sued at law for a legacy, unless being specific he had assented to it, or he had ceased to hold the legacy as executor, or, for forbearance by the legatee, he had promised to pay it. This is probably unaltered by those Acts. It is, however, still important to note those cases in which executors could have been sued at law, as in such cases there can be no doubt now as to the propriety of commencing actions in one of the Common Law Divisions. The cases were where the executor had assented to a

C. D. by omnibus, whereby the said C. D. was killed in Cornhill, on the 15th of January, 1883.

Particulars pursuant to statute are delivered herewith.

The plaintiff claims £500.

Executor not liable on promise unless in writing.

specific legacy, and where, in the case of general pecuniary legacies, the executor admitted to the legatee that he had received the money, and that he held it to his use.

By the 4th section of the Statute of Frauds no action is maintainable against an executor or administrator, on any special promise to pay a debt of the testator, &c., out of his own estate, unless the contract is evidenced by some writing; and to charge the executor personally, there must be consideration for his promise to pay.

Formerly counts against an executor or administrator could not have been joined with counts against him personally, for claims against him on his own account. Now, however, such claims may be included in the same statement of claim, under the provisions of the Judicature Acts, and the Orders and Rules thereunder (see Order XVIII. r. 5), provided the personal claims are alleged to arise with reference to the estate of which the defendant is executor.

DEFENCES BY EXECUTORS AND ADMINISTRATORS.

Defence that the defendant was not executor, &c.

Denial that defendant was executor, &c.—An executor or administrator should be careful in pleading this defence, as, if the issue is found against him, the form of judgment against him would affect his own property, in the event of the testator's or intestate's being insufficient, on the ground that he must have known that the defence was unfounded. (See 2 Wms. Exors. 5th ed. 1789.) There is nothing in the Judicature Act which expressly alters this rule of law, except that among the forms of judgment given with the Rules of 1883 there is no form to meet such a case.

What will and will not constitute an executor *de son tort*.

In answer to this defence, it is sufficient to show that the defendant acted as executor *de son tort*. There are a variety of acts which will invest a person with this character. Evidence of slight acts of intermeddling with the property will be sufficient. A person dealing with a lease granted to the deceased is chargeable as assignee of the term. (See *Williams v. Meales*, L. R. 9 C. P. 177.) The following circumstances are enumerated by an eminent authority as *insufficient* to bind a person as executor *de son tort*, viz.:—Locking up the goods of the deceased; directing the funeral out of his effects; feeding his cattle; repairing his houses; providing necessaries for his children. (1 Wms. Exors. 7th ed. 261, 262.) The inference drawn from certain acts, on which a person is sought to be made executor *de son tort*, may be rebutted, by showing that he acted under the authority of the rightful executor (*Sykes v. Sykes*, L. R. 5 C. P. 113), or of a person to whom administration was afterwards granted. (*Hill v. Curtis*, L. R. 1 Eq. 90.)

Where a party sues or is sued as executor or administrator, his representative capacity must be specially denied if questioned. (R. S. C. Ord. XXI. r. 5, and Ord. XIX. r. 15.)

Defence that the defendant has duly administered all the assets.

Plene administravit.—In defences which correspond with the former *plene administravit*, it has been essential that the defendant should allege that he had not, at the commencement of the suit or since, any goods of his testator or intestate. (*Atkins v. Humphrey*, 2 C. B. 684.) Where such a defence was open to an executor, &c., and he did not plead it, he was taken to admit assets, and in the event of the assets of deceased

Action by Executor for Damage done to the Testator's Estate by Defendants' Negligence whereby Testator's Person was Injured.

1. The plaintiff is the executor of A. B.
2. On May 17, 1883, the defendants contracted for hire to

proving insufficient, he would be personally liable to make good the deficiency. The law is not apparently affected by the recent changes in procedure. The plaintiff may, on a defence of *plene administravit* being pleaded, sign judgment for debt and costs, to be paid out of future assets when they should come in (*quando acciderint*). If the plaintiff joins issue on such a defence, and is successful, he will be entitled to judgment to the extent of the assets proved, and of future assets for the residue of the debt, if any. (2 Wms. Exors. 5th ed. 1790.) If he fails, *semble* he will not be entitled to judgment to be paid out of future assets. (*Ib.* 1794.) But see *Hindley v. Russell*, 12 East, 232.

The observation made above on the defence denying the executorship or the administratorship, viz., that the executor, &c., should be careful not to plead it, unless he thinks he has good ground for it, will apply equally to this defence, as he will, in the event of failing to establish it, be liable for the costs of it.

The order of distribution which was formerly observed in administering assets under 22 & 23 Vict. c. 35, has been altered by the 32 & 33 Vict. c. 46, which provides that in the administration of the estate of every person dying after the passing of the Act, debts secured by bonds, or instruments under seal (specialty debts) shall have no priority over simple contract debts, "provided always that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold for his debt." It has been held that the effect of this provision is to postpone a specialty debt to an unregistered judgment obtained against an executor on a simple contract debt. (*Winchmire v. Winchmire*, 20 Ch. D. 545; *Williams v. Williams*, L. R. 15 Eq. 270.) An unregistered judgment against the deceased is not entitled to any preference. (*Kemp v. Waddingham*, L. R. 1 Q. B. 355; *Vun Ghelmire v. Nerinckx*, 21 Ch. D. 189. A further change is made by the Judicature Act, 1875, sect. 10, which declares that in the administration by the Court of an insolvent estate, "the same rules shall prevail or be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively," as may at the time prevail in bankruptcy. As to the effect of this section see *Williams v. Hopkins* (18 Ch. Div. 370).

An executor, &c., may pay a debt though barred by the Statute of Limitations. (*Louis v. Rumney*, L. R. 4 Eq. 451.) And if sued for a debt so barred, he, by omitting to plead the statute, does not render himself liable to another creditor or creditors. (*Williamson v. Naylor*, 3 Y. & C. 211.)

Where a verdict was found against an executor on a plea of *plene administravit*, and an action of debt was afterwards brought on the judgment alleging a *devastavit*, the defendant (executor) was held estopped from showing that the *devastavit* was committed with the plaintiff's consent. (*Jewsbury v. Mummery*, L. R. 8 C. P. 56, Ex. Ch.) A married woman, who has proved a will as executrix is, after her husband's death, liable for a *devastavit* committed by him. (*Soady v. Turnbull*, L. R. 1 Ch. 494.)

An executor was, by 30 Car. 2, c. 7. enlarged by 4 W. & M. c. 24, made liable for a *devastavit* by his testator or intestate. It has been held that the effect of these statutes is, that whatever act of an executor,

The order of distribution of assets changed.

Executor may pay barred debt.

carry A. B. in safety to Huntingdon, but negligently ran the train in which they were carrying him into another train, whereby he was injured.

or of an executor *de son tort*, would have made him personally liable and chargeable with payment *de bonis propriis*, will now make his personal estate liable in the hands of his executor or administrator. (2 Wms. Exors. 7th ed. 1998, 1999; and *Coward v. Gregory*, L. R. 2 C. P. 153.) But the executor of an executrix *de son tort* is not liable for breach of contract committed by the person with whose property the executrix has meddled. (*Wilson v. Hodson*, L. R. 7. Ex. 84.)

Defence that defendant has administered all the assets except a sum less than that sued for.

Plene administravit præter.—This defence consists of an allegation that the defendant has fully administered all the personal estate of the deceased except a certain sum named, and less than that claimed by the plaintiff, and that he had not, at the commencement of the suit nor since, any other personal estate. 'On this defence being pleaded formerly the plaintiff could join issue thereon and have judgment to the extent of the assets admitted, and of future assets "*quando acciderint*" for the residue of debt and costs. The defendant was at liberty to pay the amount admitted into Court.

When executors, &c., liable for torts committed by testator, &c., in his lifetime.

In tortis.—In the case of torts the maxim "*actio personalis moritur cum persona*," applied in the sense that the liability of the testator or intestate ceased with his death. However, by sect. 2 of 3 & 4 Will. 4, c. 42, "An action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for *any wrong* committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person." In a very curious case, *Kirk v. Todd*, 21 Ch. Div. 484, which illustrates the wisdom of pressing on an action of tort once begun, A. sued B. in tort, and B. died more than six months after the beginning of the action, which was continued against B.'s executors, but it was held that the action against the executors must be dismissed, the act complained of having occurred more than six months before B.'s death.

Under the Ecclesiastical Dilapidations Act (34 & 35 Vict. c. 43) there is a liability on the executors of a deceased incumbent to answer for dilapidations to the rectory, &c., to the successor.

Married woman as an executrix.

The law regarding the acceptance of the office of executrix or administratrix has been much altered by recent legislation. Before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman might be appointed as executrix, but she could not obtain a grant of probate without her husband's consent. Now (45 & 46 Vict. c. 75, ss. 1 and 24) any married woman, whether married before or after the passing of the Act, may accept the office and obtain the grant without her husband's consent, and where she takes a grant of letters of administration now, not her husband, but she will enter into the administration bond. If she should prefer the grant, we think that in principle her husband could not, as such, accept the office or obtain the grant against her will.

Formerly the husband of a *feme covert* executrix or administratrix, as well as the *feme covert* herself, was held liable for her *decastavit*. Now a woman married on or after January 1, 1883, is solely liable for her own *decastavit*, whether she becomes executrix or administratrix before or

3. By reason of the premises, the personal estate of A. B. was diminished at the time of his death, which occurred in November, 1883. He was unable to attend to his business, and lost profits, and incurred medical and other expenses.

Particulars :—

Loss of profits (26 weeks), say . . .	£100	0	0
Paid wages of W. Jones, extra assistant (26 weeks)	52	0	0
Paid Dr. Smith, for medical attendance	91	10	0
Paid Jane Roberts, for nursing (26 weeks)	27	6	0
	£270	16	0

The plaintiff claims £270 16s.

after her marriage, and her husband will not be liable at all "unless he has acted or intermeddled in the administration of the estate" (s. 24).

Who is liable for the *devastavit* of a *feme covert* married before January 1, 1883, who has obtained a grant before that date, is open to some question. (See Griffith's Married Women's Property Act, 5th. ed. pp. 142-143.)

Under the old law a wife who allowed her husband to take a grant of probate or letters of administration in her name was liable for his *devastavit* to the extent of her separate property. The husband's liability for his wife's *devastavit* was limited in some cases by the Act of 1874 (37 & 38 Vict. c. 50) to the assets he received through her.

Under the new law, if a *devastavit* be committed by a woman before marriage, a subsequent marriage settlement, settling her property with a restraint upon anticipation, will have no validity as against any person requiring her to make good the *devastavit*. (45 & 46 Vict. c. 75, s. 19.) If the settlement were after the *devastavit*, the wife's separate property not restrained from anticipation must answer it, and the settlement itself may be attacked on any of the grounds (*e.g.*, fraud) on which a settlement by a man might be attacked (s. 19).

By s. 23 of the Act 45 & 46 Vict. c. 75, "for the purposes of this Act, the legal personal representative of any married woman shall, in respect of her separate estates, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living." Her executor will now, therefore, be the executor of her will, and not merely of the property appointed by her under a power. (*Brownrigg v. Paine*, 7 P. D. 61.) Whether, if she should die intestate, her husband or her next-of-kin is entitled to administration, is a question on which there has been some difference of opinion. Mr. Wolstenholme seems to think that the next-of-kin is entitled. We think that is not so. The Act contains no express words, such as we should expect to find, taking away the husband's right, under 29 Car. 2, c. 3, s. 25, to the administration of her estate.

The position of a married woman when executrix.

Action by Administrator for Breach of Contract relating to Land (a).

1. The plaintiff, as the administrator of X. Y., deceased, has suffered damage from the defendant's negligence in his conduct for X. Y. as his solicitor of business undertaken by the defendant on X. Y.'s behalf.

2. The negligence was in not investigating the title of one V. to the Colson Estate, in the county of York, upon a sale by V. to X. Y. for £5000, whereby the estate was conveyed to X. Y. with a bad title.

3. X. Y. was evicted by the true owner in his lifetime.

Particulars of damage :—

£5000 paid to V.

The plaintiff claims £5000.

Action by Executor against Testator's Lessee for grubbing up Trees (b).

1. The plaintiff, as executor of A. B., deceased, has suffered damage by the defendant's breach of a covenant contained in a lease for seven years of the Folly Farm, by A. B., to the defendant, made under seal by indenture dated the 7th of August, 1880.

2. By the covenant the defendant covenanted not to grub up, fell or crop any timber trees on the Folly Farm which were excepted out of the said lease.

3. In the lifetime of A. B. the defendant felled four timber trees on the Folly Farm.

The plaintiff claims £30 damages.

Action against an Executor for Balance due on the Sale of the Goodwill of a Business.

1. The defendant is the executor of A. B., deceased.

2. On June 1, 1882, the plaintiff sold the goodwill and

(a) See *Knight v. Quailes*, 2 Brod. & B. 102; 4 Moore, 532; *Williams on Executors*, 8th ed. p. 811.

(b) See *Raymond v. Fitch*, 2 C. M. & R. 588; 5 Tyrwh. 958.

stock-in-trade of his business of a haberdasher to A. B. for £2000, and A. B. received and took possession of the same.

3. A. B. in his lifetime paid the plaintiff £1500 on account of the said sum of £2000.

The plaintiff claims £500.

Defence.

The defendant says that :

1. The purchase-money was agreed by the plaintiff and the said A. B. at £1800 and not at £2000.

2. A. B. in his lifetime paid the said sum of £1800.

3. The defendant does not admit assets.

4. The estate of the said A. B. which came to the defendant's hands has been already applied by the defendant in a due course of administration in satisfying other debts due by the said A. B., and of superior degree to the plaintiff's.

Exoneration.

(See *Release—Recission.*)

False Imprisonment (a).

1. Claim for False Imprisonment against a Constable.

On the 3rd of July, 1880, the defendant, maliciously and without reasonable or probable cause, arrested the plaintiff and

(a) A total restraint of the liberty of the person for however short a time "even by forcibly detaining the party in the streets against his will" will amount in law to an imprisonment (*Bird v. Jones*, 7 Q. B. 742, 752); and if such imprisonment is unjustifiable it will amount to a false imprisonment and be actionable. An arrest or imprisonment, however, is not confined to a corporal seizure. "If a person send for a constable and give another in charge for felony, and the constable tell the party, charged that he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go and does actually go, this is an imprisonment." (*Per Abbott, C.J.*, in *Pocock v. Morse*, Ry. & Mo. 321.) But though there need not be an actual seizure of the person to constitute an imprisonment, the restraint on his

What constitutes a false imprisonment.

A partial restraint

had him detained in the M. lock-up for ten hours, when he was discharged by an order of a magistrate.

The plaintiff claims £50 damages.

Defence.

1. The defendant is a police constable of the M. borough police force.

2. On the night of the said 3rd of July the defendant while

will not constitute an imprisonment.

Classes of defences to action for false imprisonment.

I. ARREST IN EXECUTION OF A WARRANT.

Responsibility of sheriffs, constables, &c., making an arrest.

(Of justices issuing a warrant of arrest.

Liability of persons setting the justice in motion.

liberty must be total. A partial restraint, as by preventing a person advancing along a particular pathway, while allowing him to retire, is not enough. (*Bird v. Jones, supra.*)

It may be taken that, *prima facie*, any imprisonment of another is unlawful and actionable, and it lies upon the defendant first to plead and then to prove facts justifying the imprisonment. This introduces the subject of defences to this kind of action. These defences may be briefly adverted to under two heads: First, where the defendant justifies on the ground that he was executing legal process; and secondly, where the defendant does not plead that he was actually executing a warrant, but sets up that he had reasonable and probable cause for believing that the plaintiff had committed an offence for which he was by law justified in arresting him.

Coming to the first of these heads of defence, a distinction must be drawn between the subordinate ministers of the law, as constables and bailiffs, and those who set them in motion. The law may be stated in a few words to be that, where sheriffs, bailiffs, or constables act within the terms of the warrant issued to them, and arrest the right persons, and use no more violence than is absolutely necessary, they are protected, although the warrant is in some respects irregular, and may even have been issued without jurisdiction. (See the 13 & 14 Vict. c. 61, s. 19, the 19 & 20 Vict. c. 108, s. 60, as to bailiffs of county courts, and the 24 Edw. 2, c. 44, s. 6, as to constables.)

With respect to justices issuing the warrant, the law is otherwise. If a justice issues a warrant, *having no jurisdiction in the matter*, and the plaintiff is arrested on such warrant, the constable executing the same is free from responsibility, but the justice is liable in an action; but if the justice *have jurisdiction*, he can only be made liable in an action by the plaintiff alleging and proving that he acted maliciously and without reasonable and probable cause. It is important, however, to bear in mind that where a justice is sued for anything done by him in his office, the plaintiff may be called on to show, as conditions precedent to his right of suing (*a*) that he has given the justice one month's notice of action; and (*b*) that any conviction or order made against him upon the warrant has been quashed; and it is also important to remember that the justice when sued can tender a sum of money as amends, and raise all the defences which he means to rely on by the general plea of "Not guilty by statute." (See the 11 & 12 Vict. c. 44, ss. 10, 11, and Addison on Torts, c. 15, sec. 3.) Where the justice or judicial officer has not acted altogether *mero motu*, but has been in the first instance set in motion by another, it will depend upon a number of circumstances whether such person is liable as well as the justice. No doubt if he acted maliciously and without reasonable and probable cause, he would be liable in damages for a malicious arrest, and perhaps for a malicious prosecution; but if a man merely lays a complaint before a justice in a matter over which the justice has a general jurisdiction, and the justice grants a warrant upon

in the course of his duty found the plaintiff loitering in a highway within the borough of M.

3. The defendant had good cause to suspect and did suspect that the plaintiff was about to commit one of the felonies

which the person charged is arrested, the party laying the complaint is not responsible for a false imprisonment, although the particular case is one in which the justice had no authority to act. (*Carratt v. Marley*, 1 Q. B. 18.)

Another case of a person justifying an imprisonment in the due execution of process of law, is a gaoler defending an action brought against him by a prisoner. In *Graves v. Keene*, L. R. 4 Ex. 73, a person who had been committed into custody for failing to comply with an order directing the payment of money under a warrant for contempt, at the end of a year demanded his release in writing, and when the governor of the gaol in which he was detained refused to release him, he brought an action for false imprisonment. It was held that the defendant was protected by the warrant of committal. And where a prisoner was received into custody on the 31st of October under a sentence of "one calendar month's" imprisonment, and a further term of "fourteen days," to commence at the expiration of the imprisonment previously adjudged, it was held that he was not entitled to his release until midnight of the 14th of December. (*Migotti v. Colville*, 48 L. J. M. C. 48; affirmed 48 L. J. C. P. 695; L. R. 4 C. P. D. 233.)

So far attention has been directed to the class of cases where an imprisonment is justified on the ground that the defendant was acting in the execution of a warrant, but in certain cases a man is justified in arresting another although he is not the holder of a warrant for his arrest. The chief of these cases are: 1. Where a constable has reason to believe that a *felony* has been committed, and that the plaintiff has committed it, he may arrest him without warrant. 2. Where a *felony* has *actually been committed*, and there is reasonable and probable cause for believing that the plaintiff has committed it, a private individual may arrest another without warrant. 3. Either a constable or a private individual may while an affray is going on, and to prevent the continuance of a breach of the peace, make an arrest. 4. By the Malicious Injuries to Property Act (24 & 25 Vict. c. 97, s. 61) it is provided that any person found committing an offence under that Act may be arrested without warrant (a) by a constable; or (b) by the owner of the property injured, his servant, or any person authorised by him, as the occupier. 5. Any person found committing an indictable offence, whether a felony or a misdemeanor, in the night-time, *i.e.*, between 9 p.m. and 6 a.m., may be arrested without a warrant. 6. Vagrants may be arrested without warrant. 7. So any person guilty of riotous or indecent behaviour in any church or chapel. 8. By the 2 & 3 Vict. c. 47, s. 54, special powers are given to the metropolitan police to arrest persons committing numerous offences of a disorderly kind, enumerated in the Act within the Metropolitan limits. 9. Special powers of arrest are also given by the Merchant Shipping Acts to the masters of passenger ships. (See the 25 & 26 Vict. c. 63, s. 37.) 10. A bail whenever he pleases may render his principal into custody. 11. By the Larceny Act, 24 & 25 Vict. c. 96, s. 103, and by the Act relating to the coin, 24 & 25 Vict. c. 99, s. 31, any person may arrest a person committing an offence against either of these Acts. 12. It is lawful to restrain the liberty of a dangerous lunatic without any warrant or authority, but this can only be done for a short time. The statutes 8 & 9 Vict. c. 100; 16 & 17 Vict. c. 96, establish a mode of proceeding with respect to the confinement of lunatics, and any devia-

II. ARREST
WITHOUT A
WARRANT.

Cases
when this
is justifi-
able.

mentioned in the 24 & 25 Vict. c. 100, and he accordingly took him into custody with a view to his being brought before a Justice of the Peace and dealt with according to law.

2. Another Claim for False Imprisonment against a Constable.

On the 3rd of May, 1881, the defendant, maliciously and without any reasonable or probable cause, arrested the plaintiff and falsely imprisoned him for a long time, to wit, half-an-hour.

The plaintiff claims £50 damages.

Defence.

By public
statute—
the 24 & 25
Vict., c. 96,
s. 113.

The defendant pleads not guilty by statute.

3. Claim against a Governor of a Gaol for False Imprisonment.

On the 30th of April, 1880, the defendant, maliciously and without reasonable and probable cause, falsely imprisoned the

tion from it will render the detention of a lunatic a false imprisonment. 13. Many Acts of Parliament under which railway companies are incorporated, authorise an officer of the company to arrest any person whose name and residence shall be unknown, and who shall commit any offence against the Act, and convey him before a justice without any other warrant or authority than that given by the Act. Except in the cases enumerated, and perhaps one or two other, it is not lawful to arrest or imprison without a warrant. Thus no one may arrest another for a misdemeanor, as perjury or conspiracy or false pretences, without a warrant. (*Matthews v. Biddulph*, 3 M. & G. 390.)

Special de-
fence of
constables
acting *bona*
fide.

As a rule, where a police officer, acting *bona fide* in the discharge of his duty, arrests the wrong person, or one who has in fact committed no offence against the law, no action can be brought against the officer unless a month's notice in writing has been given him of such action. Any proceeding must be commenced within six months of the accruing of the cause of action; and the defendant is entitled to plead "not guilty" by statute. It is further generally provided that no plaintiff shall recover in such an action if a sufficient tender of amends has been made, or if a sufficient sum has been paid into Court, and even if the plaintiff gets a verdict he shall not have any costs, "unless the judge before whom the trial shall be shall certify his approbation of the action." (See the 24 & 25 Vict. c. 96, s. 113; also c. 97, s. 71; also c. 99, s. 33.) The pleader before pleading not guilty by statute merely, will, of course, satisfy himself that the particular statute under which the defendant was acting authorises the use of this plea. In *Green v. Hutt*, 51 L. J. 640, a notice of action given under 24 & 25 Vict. c. 96, s. 113, was correct in all particulars, except that it specified the arrest as having taken place on the 13th of April instead of the 12th of April. Held that such notice was not invalidated by a mere mistake in the date not calculated to injure or prejudice the defendant.

plaintiff and continued falsely to imprison him until the 30th of May, 1880.

The plaintiff claims £100 damages.

Defence.

1. The defendant is the Governor of the C. Gaol.
2. During the time mentioned in the statement of claim he detained the plaintiff in the C. Gaol under a warrant of commitment signed by A. B., Esq., and C. D., Esq., two justices of the peace acting in and for the borough of C., committing the plaintiff to the C. Gaol for one calendar month with hard labour, which is the grievance complained of.

4. Claim for Assault, False Imprisonment, and Malicious Prosecution.

1. On the 1st of May, 1880, the defendant, in company with a police officer, arrested the plaintiff and took him into custody upon a false charge of larceny, and conveyed him to the B. Gaol, where he was falsely imprisoned.
2. On the 2nd of May, 1880, the defendant further maliciously and without reasonable and probable cause, preferred a charge of larceny against the plaintiff before a Justice of the Peace, causing the plaintiff to be sent for trial on the said charge.
3. The defendant at the ensuing Quarter Sessions for the borough of B. maliciously and without reasonable and probable cause, further prosecuted the plaintiff upon the said charge, when he was acquitted.

Particulars of special damage :—

Mr. J. S., bill of costs, £30.

The plaintiff claims £400 damages.

Ferocious Animals (a).

1. Claim for Personal Injuries caused by the Bite of a Savage Dog.

1. On the 13th of March, 1882, the plaintiff was bitten by a dog the property of the defendant.

(a) The owner of an animal which is ordinarily vicious, as a lion or a bear, is liable for its acts of ferocity, for he is bound to keep it secure at

2. The said dog at the time was a savage and vicious dog to the defendant's knowledge.

Particulars of special damage:—

Dr. Jones' bill	£10 10 0
Loss of a fortnight's salary	£8 0 0

The plaintiff claims £50.

Defence.

1. The said dog was not the property of the defendant.
2. The said dog was not a savage and vicious animal.
3. It was not savage and vicious to the defendant's knowledge.

The gist of the action is the keeping with knowledge of the ferocity.

his peril; but the owner of a domestic animal, as an ox or a dog, is only liable if he knows that the animal is accustomed to do mischief. (*R. v. Huggins*, 2 Ld. Raym. 1583.) The gist of the action is not the negligent keeping, but the keeping at all with knowledge of the mischievous propensity. (*May v. Burdett*, 9 Q. B. 101; *Jackson v. Smithson*, 15 M. & W. 563.)

What amounts to such knowledge.

The essential ingredients in an action against the owner of a dog or other domestic animal which has injured a man or woman, are—1, that the defendant knew the animal was vicious; 2, that after this knowledge he continued to keep the animal; and 3, that it inflicted an injury upon the plaintiff. Knowledge of the vicious nature of the animal need not be brought home to the defendant personally; knowledge by a servant who has charge of the dog is enough (*Baldwin v. Cusella*, L. R. 7 Ex. 325; *Applebee v. Percy*, L. R. 9 C. P. 647; *Gladman v. Johnson*, L. J. 36 C. P. 153); and as to the extent of the defendant's knowledge of the animal's viciousness, it need not be shown that he knew the animal had actually bitten any one before. It is sufficient if it has evinced a savage disposition, as by flying at any one and attempting to bite. (*Worth v. Gilling*, L. R. 2 C. P. 1.) The fact that the defendant has warned another to beware of the dog is evidence that he knew it had a vicious disposition. (*Judge v. Cnr*, 1 Stark. 285.)

The defendant is liable though the animal is not really his property, if he knowingly harbours it on his premises; but where a defendant had done all that was reasonable to get rid of a stray dog which had come on to his premises, he was held not liable for an injury done by it. (*Smith v. Great Eastern Rail. Co.*, L. R. 2 C. P. 4.) A person who keeps a vicious animal about his premises, except for the purpose of protecting his property, which he is entitled to do (*Brock v. Copeland*, 1 Esp. 205), is responsible though he has taken every precaution, as he fancies, to prevent its escaping and doing mischief. (*Jones v. Perry*, 2 Esp. 483.)

Though a man cannot recover damages for an injury done to himself by a ferocious dog, unless he can prove that its master knew of its ferocity, the owner of sheep or cattle can recover for an injury done to his sheep and cattle (including in this term, horses and mares, and perhaps pigs (*Wright v. Pearson*, L. R. 4 Q. B. 582), without averring or proving any such scienter, as it is phrased. This is provided by the 28 & 29 Vict. c. 60, to which the pleader is referred.

2. Claim for Injury done to Sheep by a Dog.

On the 1st of May, 1876, a dog which was then kept by the defendant upon his premises broke into the plaintiff's land and made an attack upon and bit and worried a flock of the plaintiff's sheep which were therein.

Particulars of damage :—

Three sheep killed, at £3 each	.	.	£9	0	0
Five sheep injured.	.	.	£8	0	0
Bill of W. H. H., veterinary surgeon	.	.	£2	0	0

The plaintiff claims £——.

Defence.

The defendant says :

1. The said dog was not kept on the defendant's premises, nor was it his dog.
2. It did not bite or worry any of the plaintiff's sheep.

Fraud.

(See *Misrepresentation*).

Freight.

(See *Bills of Lading—Carriers—Charter-party*.)

Goods.

(See *Sale of Goods*.)

Goodwill (a).

1. *Claim for the Agreed Price at which the Goodwill of a Business was Sold.*

1. On the 10th of May, 1882, the plaintiff sold, and the defendant purchased, the goodwill of the business of a chemist and druggist which the plaintiff was then carrying on in Calne, for an agreed price of £20 to be paid on the said date by the defendant, and a further sum of £80 a month afterwards.

2. The defendant paid the said sum of £20, but at the expiry of a month he failed to pay the further sum of £80.

The plaintiff claims £80.

What passes under sale of goodwill.

(a) "An assignment of a business and its goodwill, *without more*, appears to us to pass now just as much and no more than in the days of Lord Eldon. As against the assignor it confers on the assignee the exclusive right to carry on the business assigned, and, as incidental to this, it also confers on him the exclusive right to represent himself as carrying on that business, and consequently the right, not only to sue the assignor for damages if he has infringed these rights, but to restrain him from infringing them if he manifests an intention of infringing them." (*Per* Baggallay, L. J. in *Walker v. Mottram*, 19 Ch. D. 355 (C. A.); 51 L. J. Ch. 108.) The vendor of a business and the goodwill thereof may, in the absence of express stipulation to the contrary, set up a business of the same kind either in the same neighbourhood or elsewhere, and he may publicly advertise the fact of his having done so. (*Labouchere v. Dawson*, 13 Eq. 322; 41 L. J. Ch. 427.) He may also deal with old customers; but he will be restrained from soliciting their custom. (*Leggett v. Barratt*, 15 Ch. Div. 306; 51 L. J. Ch. 90 (C. A.), disapproving *Ginesi v. Cooper*, 14 Ch. D. 596; 49 L. J. Ch. 601.)

Effect of sale of goodwill by trustee in bankruptcy.

But the rule that a vendor of a goodwill will be restrained from soliciting his old customers only applies to *voluntary* alienations, and therefore a purchaser of the goodwill of a business from a trustee in bankruptcy or liquidation, has no right to restrain the bankrupt or liquidating debtor from setting up *bonâ fide* a fresh business, and soliciting the customers of his former business, and it is immaterial whether the bankrupt has or has not joined in the conveyance of the goodwill to the purchaser (*Walker v. Mottram*, quoted, *supra*). So a partner who has been expelled under a provision in the partnership articles, and has been repaid his share of the capital will not be restrained from carrying on business on his own account, and soliciting the old customers of the firm. (*Dawson v. Beeson*, 22 Ch. Div. 504.)

In the recent case of *Arundell v. Bell*, 52 L. J. Ch. 538, Jessel, M. R., intimated that as a general rule and in the absence of express contract there is not in a partnership between *solicitors*, any partnership asset capable of being sold or valued as the goodwill of the partnership business.

But though the vendor of the goodwill of a business will not be restrained from setting up a fresh business of the same kind, yet if (as is generally the case) he has as a term of the purchase and sale of the goodwill expressly agreed not to commence and carry on a business, he will be forbidden by injunction to do so.

*Defence and Counter-claim.**Defence.*

1. At the time of the making of the contract mentioned in the claim, the plaintiff fraudulently represented to the defendant that the takings of the said business had averaged during the past year from £28 to £30 a week, and by such representation induced him to agree to purchase the same.

2. The takings of the said business had not averaged during the past year from £28 to £30 a week, or anything like that sum, as the plaintiff at the time of making the said representation well knew.

3. As soon as the defendant discovered the said misrepresentation, he avoided the said contract, and he has never received any benefit under the same.

Counter-claim.

1. The defendant repeats all the allegations contained in the defence, and says further, that by means of the said false and fraudulent representations the plaintiff obtained from the defendant, on the said 10th of May, the sum of £20.

The defendant claims the said sum of £20.

Reply.

1. The plaintiff joins issue upon the statement of defence.

2. As to the counter-claim, he denies that he ever made the representation alleged, or that the same was false.

3. The defendant has not avoided the said contract of sale, and he has derived benefit under it.

2. Claim for an Injunction against the Vendor of a Business who is soliciting the Old Customers.

1. By an agreement dated the 20th of August, 1880, made between the plaintiff and the defendant, the former purchased from the defendant the goodwill of the business of a tailor and draper, which the defendant was then carrying on, under the name and style of C. E. & Son, at Berwick, for the sum of £150.

2. In the month of September, 1880, the defendant commenced the business of a tailor and draper in Berwick aforesaid, and he has since continued such business under the name or style of C. E. & Son.

3. The defendant, in the month of October, 1880, in writing, solicited many of the old customers of the said business which he had sold to the plaintiff to deal with him.

The plaintiff claims :—

(1.) An injunction to restrain the defendant from carrying on in Berwick, aforesaid, the said business of a tailor and draper under the style or firm of C. E. & Son, and to restrain him, his servants and agents, from soliciting in any way the custom of persons who dealt with him before he sold the said business to the plaintiff.

(2.) Damages.

Guarantee (a).

1. *Claim on a Guarantee for the Price of Goods setting out Guarantee.*

The plaintiff's claim is for the price of goods sold and delivered by the plaintiff to E. F. under the following guarantee :—

Sir,—In consideration of your supplying goods to E. F., I undertake to see you paid. Yours, &c.,

C. D. (*Defendant*).

To Mr. A. B. (*Plaintiff*).

Contract of
guarantee
must be
evidenced
by writing.

(a) A guarantee is a contract to answer for the payment of a debt, or the performance of a duty by another person.

The Statute of Frauds (29 Car. 2, c. 3), s. 4, provides (*inter alia*) that no action shall be brought whereby to charge the defendant on any special promise to answer for the debt, default, or miscarriage of another person unless the agreement on which such contract shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

By the 19 & 20 Vict. c. 97, s. 3, it was enacted that no such contract should be deemed invalid by reason only of the consideration for the promise *not appearing* in writing or by necessary inference from the written document. There must, however, still in fact be consideration for the promise; and though the *consideration* can now be shown by

Particulars :—

1882.	55 tons of coal at 20s.	.	.	£55	0	0
Mar. 25.						
	Amount due .	.	.	£55	0	0

The plaintiff claims £55.

parol yet the *promise* must appear in the instrument without reference to extrinsic facts or arrangements. (*Holmes v. Mitchell*, 28 L. J. C. P. 381.)

There are some agreements which at first glance present features strongly resembling guarantees, but which do not really possess the essential character of that contract, which is *that there must be a third person primarily liable*, and that the guarantor promises the creditor that if such third person, who is the debtor, will not pay, he (the guarantor) will. Therefore, if the promise is given in terms implying the acceptance of a sole liability, as where A. says to a trader with regard to goods supplied to B., "I will see you paid," and the price of the goods is charged to A., this is not a guarantee, as would be a promise that if B. did not pay A. would. So where the promise involves an extinction of the original debt, or a transfer of it to the promissor. Thus, where before the partial abolition of imprisonment for debt, and when arrest on a *ca. sa.*, followed by discharge of the debtor from prison, put an end to the claim against him, if a person promised the creditor that he would pay the debt if the debtor were discharged, this was no guarantee, because there was no person primarily liable after the promise was made. (*Gundman v. Chase*, 1 B. & Ald. 297.) The doctrine is very clearly stated in *Mountstephen v. Lakeman* (L. R. 7 Q. B. 196, Ex. Ch. affirmed L. R. 7 H. L. 17; 43 L. J. Q. B. 188). It is there laid down that the fact of the original liability ceasing does not take away its character of a guarantee from the defendant's promise, and that it is sufficient to give it this character if the original or primary debtor continues liable *during any time after the contract is made*.

The essential characteristic of the contract of guarantee.

The promise must be made to the original creditor. (*Eastwood v. Keyon*, 11 Ad. & E. 438; *Reader v. Kingham*, 32 L. J. C. P. 108.) Therefore a promise by A. to a County Court bailiff about to arrest B., a debtor, on a warrant of commitment, that if he would not arrest him he would pay the creditor, or surrender B. on a given day, was held in the last-mentioned case not to be within the statute.

The promise must be made to the original creditor.

The agreement to be answerable for the payment of goods sold by a *del credere* agent to his customers is not within the above provision, for although it may eventuate in a liability to pay the debt of another, that is not the immediate object of his promise. (*Contourier v. Hastie*, 8 Ex. 40; 22 L. J. Ex. 97.)

The names of both parties to the contract of guarantee must appear in the note, though the signature of the guarantor only is necessary. (*Williams v. Lake*, 29 L. J. Q. B. 1.)

By 19 & 20 Vict. c. 97, s. 4, no promise to answer for the debt, default, or miscarriage of another made to a person, or two or more persons, or to one person trading under the name of a firm—and no promise to answer for the debt, &c., of such firm, persons, or person, so trading—shall be binding on the maker in respect of anything done or omitted to be done after a change in any one or more of the firm or persons so trading, *unless the intention that the promise shall continue to bind, notwithstanding such change, shall appear by express stipulation or by necessary implication from the nature of the firm or otherwise*.

Guarantees given to a firm invalidated by any change in the firm.

Defences. 1. A denial of the contract. A defendant may plead that he never made the contract, or that there was no consideration for it, or

2. Claim for the Price of Goods against the Principal Debtor and the Surety.

The plaintiff's claim is against the defendant, A. B., as principal, and against the defendant, C. D., as surety for the price

Defences to actions on guarantees.

that it was not in writing as required by the Statute of Frauds. Here the pleader must bear in mind Order XIX. r. 20, which provides that where a contract, promise, or agreement, is alleged in any pleading, a bare denial of the same shall be construed only as a denial of the fact of the express contract, promise, or agreement alleged, or of the matter of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise. Therefore, if the defendant wishes to rely on the Statute of Frauds as his defence he must distinctly say so, and if he wishes to contend that there was no consideration for his promise, again he must distinctly say so.

Effect of the death of the guarantor.

2. The death of the guarantor. To what extent a guarantee is determined by the death of the guarantor has been the subject of a great deal of discussion of late, and the law is still in a very unsettled state on the subject. In *Coulthart v. Clementson* (5 Q. B. D. 42), the present Lord Justice Bowen, acting upon the principle of *Harrison v. Fawcett* (L. R. 15 Eq. 311; 8 Ch. 866), decided that a continuing guarantee, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor. In the later case of *Lloyds v. Harper*, 16 Ch. D. 291, the Court of Appeal affirming Fry, J., held that a guarantee *the consideration for which is given once for all*, cannot be determined by the guarantor, and does not cease with his death. James and Cotton, L.JJ., declined to give any opinion upon the soundness of the doctrine laid down in *Coulthart v. Clementson*, though Lush, L.J. expressed his approval of it. There is, however, as the Court of Appeal pointed out, a great distinction between a case where the guarantee is of a running account merely, and the person guaranteed is not bound to give any credit after the determination of the guarantee by notice, and a case where on the part of the person guaranteed the whole consideration has been performed. In the recent case of *Beckett & Co. v. Addyman*, 9 Q. B. D. 783, Lord Coleridge and Brett, L.J. assumed that the law was settled that in the case of a continuing guarantee it was in the power of the guarantor to determine his liability by notice. There the point decided was that the death of one of the co-sureties under a joint and several continuing guarantee does not by itself determine the future liabilities of the surviving co-surety.

What the creditor is bound to communicate.

3. Concealment of material particulars by the principal at the time the contract was made. The duty of the principal, *i.e.*, what he is bound to disclose, is always a question for the jury, subject to the direction of the judge. The duty of the creditor towards a surety in such circumstances is laid down by Lord Campbell, in *Hamilton v. Watson* (12 Cl. & F. 109). He says a surety is only entitled to the disclosure of any arrangement that may exist between the debtor and creditor that may make his position different from what he would reasonably expect; and hence, if a person undertakes to be responsible for a cash credit given to a customer of a banker, the banker is not bound voluntarily to communicate the fact that the intention is to apply the credit to an old debt due to the banker by the customer. But see *Lee v. Jones*, 34 L. J. C. P. 181, and compare *North British Insurance Co. v. Lloyd*, 10 Ex. 523; 24 L. J. Ex. 14, in which the Court adhered to Lord Campbell's opinion, and laid down that the rule which prevails in assurances upon ships or

of goods sold and delivered by the plaintiff to A. B., on a guarantee by C. D., dated 2nd February, 1882.

Particulars :—

2nd February—Goods	£47 15 0
3rd March—Goods	105 14 0
17th March—Goods	14 12 0
5th April—Goods	34 0 0
	£202 1 0

The plaintiff claims £202 1s.

3. *Claim upon a Guarantee for the Honesty of a Brewer's Traveller.*

1. The plaintiff's claim is upon a guarantee in writing of the 3rd of August, 1880, by which the defendant promised that he would make good to the plaintiff any loss which the plaintiff might suffer by reason of A. B.'s dishonesty while in his service as a traveller.

lives that all material circumstances known to the assured must be disclosed, though there be no fraud in the concealment, does not extend to the case of guarantee. In the latter case the concealment to vitiate the guarantee must be fraudulent.

4. Alteration of the position of parties.—Any change by a binding agreement in the relative position of the creditor and a principal debtor, whereby the latter is released or the remedy against him suspended, or the risk of the surety is varied without his assent, will discharge the surety or guarantor. (*Lewis v. Jones*, 4 B. & C. 506 and 515 n.; *Cragoe v. Jones*, L. R. 8 Ex. 81; *Wilson v. Lloyd*, L. R. 16 Eq. 60.) But if the rights against the surety are reserved, the latter is not discharged. (*Bateson v. Gosling*, L. R. 7 C. P. 9.) The alteration of the liabilities of the principal debtor by statute has the same effect as by agreement between him and the creditor. (*Pybus v. Gibb*, 6 E. & B. 902; 26 L. J. Q. B. 41.) See enactment of 18 & 19 Vict. c. 79, s. 4, cited *ante*, p. 303, as to effect of change in a firm on liability of guarantor of debts due to or by them.

The effect of change in the position of the debtor or creditor.

5. The parting with or loss of any security held by the creditor against the principal debtor, even though the guarantor may not have known of its existence, and though it may have been made or given subsequent to the contract of guarantee, will discharge the guarantor to the extent of the value of the security.

The loss by the creditor of any security.

And neglecting to take advantage of a security will have the same effect as its loss in this respect as in the case of a bill of sale which the creditor neglects to register or enforce in the event of anticipated insolvency.

2. The said A. B., while in the plaintiff's service as a traveller, embezzled £151 belonging to the plaintiff.

The plaintiff claims £151.

Defence.

1. The defendant never contracted as alleged in the 1st paragraph of the statement of claim, or at all.

2. Section 4 of the Statute of Frauds has not been complied with.

3. The said A. B., while in the plaintiff's employment, did not embezzle the said sum of £151, or any part thereof.

4. Claim against Executors of a Surety upon a continuing Guarantee given by the Testator.

1. The defendants are the executors of the late J. B., of Wigan.

2. On the 12th of May, 1876, the said J. B., deceased, in writing, promised the plaintiffs that, in consideration that they would make further advances to one M. P., of Wigan, he would guarantee any balance which might be owing by the said M. P. to the plaintiffs, to the extent of £500.

3. The plaintiffs have made further advances to the said M. P., and this is now due and owing by him to the plaintiffs, a balance largely in excess of the sum of £500.

The plaintiff claims £500.

Defence.

1. The said J. B. died on the 1st of January, 1878, and the plaintiffs had forthwith notice of his death.

2. The moneys sought to be recovered in this action were advanced by the plaintiffs to the said M. P. long after they had received notice of the death of the said J. B.

3. The defendants do not admit that the sum of £500, or any other sum, is now due and owing by the said M. P. to the plaintiffs.

5. *Claim on a Guarantee for due Payment of Rent, and the fulfilment of the Covenants of a Lease.*

1. The defendant, on the 20th of February, 1879, promised the plaintiff in writing that, in consideration of his accepting his son A. B. as tenant of the plaintiff's farm of "Coltar," near Tebay, he would guarantee the due and punctual payment by the said A. B. of the yearly rent of £200, and the due fulfilment by him of all the covenants of the lease.

2. The said A. B. has failed to pay one year's rent of the said farm, and has committed the following breaches of the covenants of the said lease :—

(a) }
(b) } [*Set out in a summary form the nature of the breaches.*]

The plaintiff claims :—

- (1) £200, and
- (2) Damages for the said breaches of covenant.

Defence.

1. As to the claim for rent, the defendant is released by the plaintiff giving time to the principal debtor in pursuance of a binding written agreement of the — day of —, 188—.

2. The said A. B. has not committed any of the other breaches of covenant alleged.

3. In the alternative, and as far only as concerns the claim for damages, the defendant brings into Court the sum of £80, and says that the same is sufficient to satisfy the plaintiff's claim herein.

Heir.

(See *Recovery of Land.*)

Highways.

(See *Nuisance.*)

Hire.(See *Bailment*.)**Hundred (a).***Action against the Hundred for felonious Demolition.*

1. On the 31st of March, 1880, a mob of persons riotously and tumultuously assembled together and feloniously, and with intent wholly to destroy the same, demolished, pulled down, and destroyed the plaintiff's house called and being No. 100, High Street, in the borough of Great Marlow, and damaged the furniture therein, whereby the plaintiff has suffered damage.

2. Great Marlow is situate in the district of the hundred of the defendants.

Particulars of damage are delivered herewith, and exceed three folios.

The plaintiff claims £2000.

Husband and Wife (b).*1. Claim by Husband and Wife for Personal Injuries to the Wife.*

1. The male plaintiff resides at York, and is a draper, and the female plaintiff is his wife.

Felonious
demolition of
buildings.

(a) By sect. 2 of 7 & 8 Geo. 4. c. 31, it is enacted—"That if any church or chapel, house, or erection used in carrying on any trade or manufacture, or any machinery, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damaged by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid." As to the conditions precedent to the action, see the other sections of the same statute. To support the action it must appear that the rioters when attacking the house had an intention wholly to destroy it. (*Drake v. Fullett*, 7 Q. B. D. 201.)

(b) The whole law in regard to the liability of husbands for the contracts and torts of their wives, and the extent to which the latter may

2. On the 1st of May, 1880, the female plaintiff was crossing Wells Street, in York, when, through the negligent driving of

sue and be sued, has been recently dealt with and recast by the Legislature. By the Married Women's Property Act, 1882 (the 45 & 46 Vict. c. 75), which came into operation on the 1st of January, 1883, the Married Women's Property Act of 1870, and the Amending Act of 1874, are both repealed, with, however, the following proviso: "Provided that such repeal shall not affect *any act done or right acquired* while either of such Acts was in force, or any right or liability of any husband or wife, *married before the commencement of this Act*, to sue or be sued under the provisions of the said repealed Acts, or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such *right, or liability shall have accrued to or against such husband or wife before the commencement of this Act*" (sec. 22).

The law
recast by
Act of
1882.

In view of this provision, whenever questions of the rights and liabilities of husband and wife are raised, it may still be important to inquire *when were the parties married*, and if they were married prior to the 1st of January, 1883, the next inquiry may be whether any right or liability in respect of the matter in question has accrued under the Act of 1870 or under the Act of 1874. We cannot set out the provisions of these measures in this place, but we would remind the pleader that the Act of 1870 (the 33 & 34 Vict. c. 93) came into operation on the 9th of August, 1870, and the Act of 1874 (the 37 & 38 Vict. c. 50) on the 30th July, 1874.

The design of the Act of 1882 is to place a married woman in the same position as a *feme sole*, with regard to her capacity to acquire, hold, and transmit property of all kinds, whether real or personal, and to enable her to sue and to be sued in respect of her contracts and her torts, without the necessity of joining her husband. Her husband is still, however, liable in certain circumstances and under certain limitations for her acts, and in such cases he must be joined as a defendant. And it is submitted he is still entitled in certain cases to join with her as a plaintiff, or to sue in respect of wrongs done to her which cause loss to him.

Design
of Act.

Sect. I. (sub-s. 1) of the Act of 1882 provides that a married woman—and this includes women married before as well as after the 1st of January, 1883—shall "be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."

And by the next sub-s. "A married woman shall be capable of entering into and rendering herself liable in respect of *and to the extent of her separate property* on any contract, and of suing and being sued, *either in contract or in tort*, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceedings brought by or taken against her."

Leading
provisions.

The next sub-s. changes the old presumption of law, which was that a married woman did not contract with reference to her separate estate unless she clearly manifested an intention to bind it. Now the presumption is that she does intend to affect her separate estate.

"Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." (Sect. I., sub-s. 3.)

And with regard to the extent to which her separate estate may be bound, sub-s. 4 says "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not

a horse and cart by the defendant, she was thrown down and much injured.

3. The female plaintiff assisted the male plaintiff in his busi-

only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

Act of
1882.

By sect. 2 "Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Sect. 12 gives every woman, whether married before or after the Act of 1883, the same civil and criminal remedies in her own name against all persons, including her husband, for the protection of her separate property as if she were a *feme sole*. A married woman is after marriage liable to the extent of her separate estate for all contracts entered into by her before marriage, and all torts committed at that time, and she may be sued upon them (sect. 13). The following important sections—14 and 15—settle the extent to which her husband may be liable upon such antenuptial contracts and for such torts.

Husband
liable for
ante-
nuptial
debts of
wife to
extent of
assets.

By sect. 14 "A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife, which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bond fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property; provided always that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid."

And by sect. 15 "A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally, and against the wife as to her separate property and as to the

ness of a draper, and in consequence of the injuries she sustained he was for a period of two months deprived of her assistance.

residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."

It would seem that, under the new law, in every case a married woman can sue in her own name in respect of any wrong done to her or in respect of any contract entered into by her with reference to her separate estate. And equally she is liable to be sued, without joining her husband, in respect of all contracts made upon the faith of her separate estate, and all wrongs committed by her. But with regard to a wife's ante-nuptial debts and torts, while there is no necessity to join the husband as a defendant in such cases, yet if it is desired to have a remedy against him to the extent to which he has received assets through his wife, he must be joined, and the judgment is against the wife for the whole amount recovered, and against the husband so far as he has received assets. The creditor may if he chooses proceed against the husband alone, and seek to make him liable to the extent of any assets he may have received without joining the wife at all.

Married women sue and are sued in their own names.

A married woman may now be sued alone for any tort committed by her; but it is submitted that a husband is still liable for his wife's tort committed *during coverture*, and in such cases husband and wife may be sued jointly. It must be observed that the remedy against the wife is not a remedy against her personally. It is exclusively against her separate estate if she has any; and it is now well settled that where such separate estate is vested in trustees the latter need not be joined in an action brought with a view of merely charging it with liability for the married woman's contracts or torts. (*Davis v. Jenkins*, 6 Ch. D. 728; 46 L. J. Ch. 761; *Collett v. Dickenson*, 11 Ch. D. 687; 40 L. T. 394; *Floer v. Buller*, 15 Ch. D. 665; 49 L. J. Ch. 784.) But when the trustees are not before the Court the only order that can be made is that the plaintiff have a charge upon the wife's separate estate for the amount of his judgment and costs, and he must take subsequent measures to enforce the charge. On the other hand, if they are made parties, they may be ordered to pay over the amount of the judgment to the plaintiff.

Remedy confined to separate estate.

In an action by a creditor to enforce against the separate estate of a married woman a liability entered into on the credit of that estate, the Court will not, before the creditor has established his right by obtaining a judgment, restrain the married woman from dealing with her separate estate. (*Robinson v. Pickering*, 16 Ch. D. 660; 50 L. J. 527; 44 L. T. 165; overruling decision of Malins, V. C.)

In *Pike v. Fitzgibbon* and *Martin v. Fitzgibbon*, 50 L. J. Ch. 394; 17 Ch. D. 454; 44 L. T. 562; it was held by the Court of Appeal that the engagements of a married woman can be enforced only against so much of her separate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as remains at the time when judgment is given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements, subject to a restraint on anticipation. The Act of 1882 materially modifies the law as laid down in this case. The separate estate of a married woman, *acquired after the liability has been contracted* is now as much liable as separate estate in existence *at the time*. (Sect. 1, sub-s. 4, quoted *supra*.) But when there is a restraint upon anticipation created by any instrument prior to the 1st of January, 1883, it is still law that the debt cannot be enforced upon the estate so restrained, subject to this, that under sect. 39 of the Conveyancing and

Restraint upon anticipation.

Particulars of special damage sustained by the male plaintiff:

1880.	Dr. Smith's bill	£25 0 0
May to	Hired nurse eight weeks at £1 a	
June.	week	£8 0 0

The female plaintiff claims £100 damages.

The male plaintiff claims £150 damages.

Effect of
restraint
upon anti-
cipation.

Law of Property Act, 1881, *with the consent of the married woman*, the Court may order that any judgment shall bind her separate estate, though there is a restraint upon anticipation. (*Hodges v. Hodges*, 20 Ch. D. 749.) On the other hand, if the instrument creating the separate estate and annexing to it a restraint upon anticipation, is executed after the coming into operation of the Act by any woman herself, then by sect. 19, "No restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property, to be made or entered into by herself, shall have any validity against debts contracted by her before marriage, and no settlement or agreement for settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors." It is presumed that the latter part of the section means that any voluntary settlement made by a woman of her property can be set aside under the statutes of Elizabeth (the 13 Eliz. c. 5, and the 27 Eliz. c. 4) on the ground that they tend to defeat, delay, or hinder creditors, or under any of the provisions of the Bankruptcy laws. (See *Twyne's case*, and the notes thereon in 1 *Smith's Leading Cases* (last edition), p. 1, as to the law on this subject.)

In accordance with the principle of *Pike v. Fitzgibbon*, it was held in *Chapman v. Biggs* (11 Q. B. D. 27), that upon a judgment obtained against a married woman, moneys in the hands of trustees under a settlement in favour of the wife, *with a restraint upon anticipation*, could not be attached under Order XLV. r. 1.

In *Hodgson v. Williamson*, 15 Ch. D. 87; 42 L. T. 676; Bacon, V. C., decided that when a woman obtained credit upon the faith of her separate estate she thereby gave a charge upon a trust fund in such a sense that the creditors' claim would not be barred by any Statute of Limitations. It is now provided that every contract entered into by a woman shall be deemed to be entered into by her with respect to and to bind her separate estate. If, therefore, the decision in *Hodgson v. Williamson* is sound, married women now stand in the unfortunate position that they are deprived of the protection of the Statute of Limitations. It is respectfully submitted that *Hodgson v. Williamson* was incorrectly decided. (See the judgment of the Court of Appeal in *Robinson v. Pickering*, *supra*.)

Extent to
which a
wife is her
husband's
agent.

Although a husband is not bound by contracts which his wife, who has separate estate, enters into with reference to such estate, yet in many cases he is bound by her contracts. He is fixed with liability, if at all, on the principle of agency. A wife is her husband's agent in many instances, to bind him by her contracts. In such an event he alone is liable, and the wife is not a proper party to any action. The common case where a husband is so bound is in respect of necessities which a wife orders for the support of his establishment. The whole law on this subject was elaborately discussed in the House of Lords in the case of *Debenham v. Mellon*, 6 Ap. Cas. 24; 50 L. J. Q. B. 155; 43 L. T. 673. There it was ruled that where the husband neither does, nor assents to, any act to show that he has held out his wife as his agent, to pledge

Defence.

1. The defendant was not guilty of any negligence.
2. There was contributory negligence on the part of the female plaintiff.
3. The female plaintiff did not help the male plaintiff in his said business of a draper.

Reply.

The plaintiffs join issue upon the statement of defence.

2. Claim against a Husband and Wife for a Slander published by the latter during Coverture.

1. The defendant A. B. is an innkeeper at Preston, and the defendant C. D. is his wife.

2. On the 1st of August, 1880, the defendant C. D. falsely and maliciously spoke and published of the plaintiff, and of and concerning him in the way of his trade as a butcher, the words following, that is to say: "John Smith (meaning thereby the plaintiff) is on his last legs. My man says that he (meaning the plaintiff) will be in the *Gazette* next week and serve him (meaning the plaintiff) right, for he has been insolvent for many a long day;" meaning thereby that the plaintiff was insolvent and unable to pay his debts, and that he would be declared a bankrupt immediately.

3. By reason of the speaking of the said words M. O. of Preston refused any longer to give the plaintiff credit.

The plaintiff claims £200 damages.

his credit for goods supplied on her order, the question whether she bears that character is a question of fact, and must be decided by the circumstances of the case. The management of the husband's house raises a presumption of agency as to matters necessarily connected with that management which cannot be got rid of by proof of a mere private arrangement between the husband and wife. But when the wife does not have the management of the establishment such a presumption does not arise. And therefore in this case, when A. was the manager of an hotel of which his wife was manageress, and he made her an allowance for clothes and forbade her to pledge his credit, it was held that the husband was not liable to tradesmen from whom, despite this prohibition (of which, however, they had no notice), she purchased articles.

A married woman, living apart from her husband in consequence of his misconduct, can bind him for necessities, unless at the time she is living in adultery. (*Atkins v. Pearce*, 26 L. J. C. P. 252.)

When wife her husband's agent.

Defence.

1. The defendants deny that the defendant C. D. spoke and published the words complained of or any of them.
2. The said words, if spoken, do not bear the meaning assigned to them in the statement of claim.
3. The said M. O. has not withheld credit from the plaintiff by reason of the speaking of the said words.

∴ Claim against Husband and Wife on a Promissory Note signed by the Wife before Marriage.

1. On the 3rd of May, 1879, the defendant C. D., whose name was then C. E., by her promissory note of that date, promised to pay the plaintiff £100 three months after date.
 2. On the 4th of Sept., 1879, the defendant A. B. married the defendant C. D., and by his marriage with the said C. D., and through her, he acquired or became entitled to a sum largely in excess of £100.
 3. The said promissory note is still unsatisfied.
- The plaintiff claims from the defendant the sum of £100 with interest after the rate of 5 per cent. from the 3rd of August until judgment.

Defence of the Defendant A. B.

1. The defendant A. B. does not admit that the defendant C. D. ever signed the said promissory note.
2. If she did sign it, there was no consideration for the same.
3. The defendant A. B. has not acquired or become entitled to any sum of money or any property through his marriage with the said C. D.

Defence of the Defendant C. D.

1. The defendant C. D. did not sign the said promissory note.
2. If she did sign it, she received no consideration for so doing.

4. Claim against a Husband and Wife for a Tort committed by the Wife before Marriage.

1. The plaintiff has suffered damage from personal injuries to the plaintiff caused by the negligent driving of the servant of the defendant C. D. (then C. E.) on the 1st of January, 1880.

2. On the 10th of January, 1880, the defendant A. B. married the defendant C. D., and through her he has acquired large sums of money.

Particulars of special damage :—

Jan.	Dr. William's bill	£10	0	0
1880.	Loss of a month's salary	£20	0	0

The plaintiff claims against both defendants £200.

Defence of A. B.

1. The defendant A. B. received through his wife C. D. the sum of £100 and no more, and he has acquired or become entitled to no other property whatever by or through her.

2. Prior to the bringing of this action the defendant A. B. paid away the whole of the said sum of £100 in satisfaction of judgments duly recovered against the defendant C. D.

5. Claim against a Husband Alone in respect of his Wife's Ante-Nuptial Debt.

1. On the 1st of May, 1880, the plaintiff lent to A. B. the sum of £50 for one month.

2. On the 10th of June, 1880, the defendant married the said A. B., and he has acquired by and through his marriage with her sums of money in excess of £50.

3. The said sum of £50 has not been repaid to the plaintiff. The plaintiff claims £50.

6. Claim against a Married Woman in respect of her Separate Estate.

1. The defendant is a married woman having a separate estate.

2. Between the 1st of May, 1880, and the 1st of July, 1880, she purchased from the plaintiff a large quantity of goods (full particulars of which were delivered before action brought) amounting in all to £194, upon the credit of her said separate estate.

The plaintiff claims :—

- (1) £194; and
- (2) A declaration that her said separate estate shall stand charged with payment of the said sum of £194.

7. Claim against a Married Woman in respect of her Separate Estate, with an Alternative Claim against her Husband.

1. The defendant A. B. is a married woman having separate estate. The defendant C. D. is her husband.

2. On the 3rd of May, 1879, the defendant A. B. purchased from the plaintiff a diamond ring of the price of £40 upon the credit of her said separate estate.

3. In the alternative the plaintiff says that the defendant A. B. in purchasing the said ring acted as the agent of the defendant C. D. and by his authority.

The plaintiff claims £40 from the defendant A. B., and a declaration that her separate estate shall be charged with the said sum, or £40 from the defendant C. D.

Defence of A. B.

1. The defendant A. B. has no separate estate.
2. The price of the ring which the defendant purchased was £30 and no more.

Defence of C. D.

1. The defendant C. D. does not admit that the defendant A. B. purchased the said ring or that the price was £40.

2. The defendant A. B. in purchasing the said ring was not acting as the defendant's agent or by his authority.

8. Claim against a Married Woman and her Trustees.

1. The defendant A. B. is a married woman with separate estate, and the defendants C. D. and E. F. are the trustees under a settlement of the said separate estate.

2. The defendant A. B. by her promissory note dated the 1st of May, 1880, promised to pay to the plaintiff £150 on demand.

The plaintiff claims:—

- (1) £150 from the defendant A. B.;
- (2) That the said sum of £150 may be declared a charge upon the separate estate of the said A. B.;
- (3) That the defendants C. D. and E. F. be directed to pay to the plaintiff out of the separate estate of the said A. B. the sum of £150 and the costs of this suit; or
- (4) That a receiver be appointed of the interest of the defendant A. B. in the said separate estate;
- (5) A sale of her interest therein.

Defence of the Defendant A. B.

1. The said promissory note was paid by the defendant A. B. before action brought.

2. The only separate estate which the defendant has is a life interest in the income of a sum of £1000 settled upon the defendant without any power on her part of anticipating the same.

Defence of Defendants C. D. and E. F.

1. The defendants do not admit that the plaintiff A. B. ever signed the said promissory note or that it is now due and owing by her.

2. The defendant A. B. is entitled to the income of a sum of £1000 for her life without any power of anticipating the same, and she is not interested in any other sum or sums of which the defendants are trustees.

3. Claim against a Husband for alleged Necessaries supplied to his Wife.

1. Between the 30th of September, 1880, and the 10th of December, 1880, the plaintiff supplied goods which were of the nature of necessaries to the defendant's wife, amounting in all to the value of £54, particulars of which, exceeding in length three folios, are delivered herewith.

2. On the 9th of December the plaintiff lent the defendant's wife the sum of £15 with which to purchase necessary clothing.

3. At all times when the plaintiff supplied the said goods and advanced the said money the defendant's wife was living at R., having been deserted by the defendant and left by him without any means of support and destitute.

Defence.

1. The defendant denies that the plaintiff supplied the said goods to his wife or that the same were necessaries.

2. He denies that the plaintiff lent his wife the said sum of £15, or that it was applied to the purchase of necessaries.

3. At the time when it is alleged the said goods were supplied and money advanced the defendant had not deserted his said wife.

4. She was living at R. in pursuance of an arrangement between the defendant and her, and she was then in actual receipt of an adequate allowance.

5. The defendant further says that at the said time the defendant's wife was living in adultery with one J. E.

6. Prior to the plaintiff supplying the said goods and advancing the said money the defendant had forbidden his wife to pledge his credit, and he had publicly notified such prohibition by advertisement and otherwise.

Illegality (a).

1. Defence of Illegality to a Claim for Breach of Contract.

After the defendant agreed to let the said premises, he discovered, as the fact was, that the plaintiff intended to use the same as a hall in which to deliver lectures blaspheming the

No action can be brought on a promise to do an illegal act, or where the consideration is illegal.

(a) No action can be brought on a promise to do an illegal act or an act with an illegal object; nor can an action be brought on a promise made for an illegal consideration, or on a promise made for a consideration consisting of several parts, any one of which is illegal. (*Higgins v. Pitt*, 4 Ex. 312; *Hill v. Fox*, 4 H. & N. 359.) But where the consideration is legal, and several promises are founded on it, some of which are legal and others illegal, the legal ones can be enforced. The test for determining whether a person is precluded from recovering on account of illegality, is by considering whether the plaintiff can make out his case

name of Christ and denying the truthfulness and inspiration of the Bible, whereupon the defendant refused to deliver up possession of the said premises, which is the grievance complained of.

otherwise than through the medium of the illegal transaction to which he was himself a party. (*Taylor v. Chester*, L. R. 4 Q. B. 309, 314.)

A plaintiff will not be able to recover either for work done or materials provided where the whole forms one entire subject-matter made in violation of an Act of Parliament. (*Bensley v. Bignold*, 5 B. & A. 335.) Thus a printer will not be able to recover from the publisher his charges for work and paper, &c., in the printing of a libellous or blasphemous book. (*Popplett v. Stockdale*, Ry. & M. 337; *Clay v. Yates*, 25 L. J. Ex. 237.) An undertaking by a railway company to indemnify the promoters of another railway in case of their failing to obtain a bill is illegal, as there is no authority to expend any of its funds in such a manner. (*Macgregor v. Deal and Dover Rail. Co.*, 22 L. J. Q. B. 69, Ex. Ch.) But an agreement with a landowner for a payment in consideration of his withdrawing opposition to a bill for extension of powers is not illegal. (*Taylor v. Chichester and Midhurst Rail. Co.*, L. R. 4 H. L. 628.) A London broker cannot maintain an action for commission for buying and selling stock, &c., unless duly licensed by the mayor and aldermen of London under 6 Anne, c. 16 (*Cope v. Rowlands*, 2 M. & W. 149); nor for sale of shares in a company British or foreign (*Smith v. Linds*, 27 L. J. C. P. 335), but he may recover money paid by him to a seller on account of his principal for which the broker is by usage liable as principal. (*Ib.*)

Money lent for the purpose of playing an illegal game cannot be recovered (*McKinnell v. Robinson*, 3 M. & W. 434); but money paid at the implied request of the principal in fulfilment of a wagering contract may be recovered back (*Rosewarne v. Billing*, 33 L. J. C. P. 55; 15 C. B. (N.S.) 316; *Oldham v. Ramsden*, 44 L. J. C. P. 309; *Ex parte Tyke in Re Lister*, 8 Ch. D. 754; *Lynch v. Goodwin*, 26 Sol. Jour. 509; and *Read v. Anderson*, 10 Q. B. Div. 100). "Although the law will not compel the loser of a bet to pay it, he may lawfully do so if he pleases; and what he may lawfully do himself he may lawfully authorise anybody else to do for him; and if by his request or authority another person pays his lost bets, the amount so paid can be recovered from him as so much money paid to his use" (*Per Hawkins, J.*, in latter case).

By the 8 & 9 Vict. c. 109, s. 41, "All contracts and agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void, and no suit shall be brought or maintainable in any court of law or equity for recovering any sum of money or valuable thing alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made, provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise." In *Diggle v. Higgin*, 2 Ex. Div. 422; 46 L. J. 721, the cases under this section were reviewed by the Court of Appeal, and it was held that an agreement to walk a match for £200 a side, the money being deposited with a stakeholder, is a wager, and null and void under the 8 & 9 Vict. c. 109. The deposit of the money is not a subscription or contribution for a sum of money to be awarded to the winner of a lawful game within the proviso. The winner of the match cannot sue the loser or the stakeholder to recover the stakes, but a depositor may maintain an action to recover back the share deposited by him with the stakeholder, overruling *Batty v. Mar-*

Instances of illegal contracts.

Payment of bets.

Gaming and wagering contracts.

2. *Another Defence of Illegality to a Claim for Money had and received.*

The defendant says that the only agreement he ever made with the plaintiff was that in the event a horse called Regal winning the Grand National, and the defendant realising large sums by his bets thereon, he would pay the plaintiff £50 out of such winnings. The said agreement was by way of gaming and wagering, and is within the 8 & 9 Vict. c. 109.

Immorality (a).

1. *Defence of Immoral Consideration to a Claim for Hire of a Brougham.*

The said brougham was hired by the defendant, as the plaintiff well knew, for the purpose of attracting men, and for an immoral purpose.

Illegal contracts.

riott (5 C. B. 818; 17 L. J. C. P. 215). See also upon this statute, *Batson v. Newman*, 1 C. P. D. 573; *Beaton v. Beaton*, 1 Ex. D. 18; *Higginson v. Simpson*, 2 C. P. D. 76; *Hampden v. Walsh*, 1 Q. B. D. 189; 45 L. J. Q. B. 238; *Trimble v. Hill*, 5 Appeal Cases, 342.

An agreement to let rooms intended for the purpose of delivering blasphemous lectures is not binding, and a landlord, though he assigned another ground for refusing to perform his contract, can set up this defence. (*Coran v. Milburn*, L. R. 2 Ex. 230.)

By 29 Car. 2. c. 7, s. 1, "No tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's-day or any part thereof, works of necessity and charity only excepted." The contract must be completed on the Sunday to bring it within this provision. (*Williams v. Paul*, 6 Bing. 653; *Blossome v. Williams*, 3 B. & C. 232.)

Contracts in general restraint of trade are illegal. See, for further information on this subject, notes to *Mitchell v. Reynolds*, 1 Smith L. Cas. 406.

Defence of illegality to be specially pleaded.

The defence of illegality should, even formerly, have been specially pleaded, and it was not sufficient to state merely that the contract was illegal, but the particular facts should be stated from which the illegality as a matter of law could be inferred. (*Ranford v. Copeland*, 6 A. & E. 482.) This is in conformity with the present rules of pleading. Where the defence is not pleaded, and the illegality appears in the plaintiff's evidence, it seems no use can be made of it by the defendant. (*Francis v. Laycock*, 1 Q. B. 414.)

When contracts founded on an immoral con-

(a) Any person who is a party to an immoral contract, or a contract involving encouragement to immorality, cannot recover damages for its breach. Thus, charges for board and lodgings by a brothel-keeper cannot be recovered by him in an action against a prostitute. (*Howard v. Hodgdes*, 1 Selw. N. Prius, 13th Ed. 80.) So, for rent of a room let to a

2. *Defence of Immoral Consideration to a Claim on a Deed.*

The only consideration for the defendant's covenant in the said deed was a promise by the plaintiff to renew and continue an immoral intimacy with him.

Infancy (a).

Defence of Infancy to a Claim.

The defendant was an infant at the time of making the alleged contract [or, contracting the alleged debt, *as the case may be*].

prostitute with knowledge of her character, and that it was to be used for the purpose of prostitution, or for rent accrued due after becoming aware of the purpose for which it was taken. (*Smith v. White*, L. R. 1 Eq. 626.) So, the hire for a brougham supplied to a prostitute with a knowledge of her character, and that it was to be used by her for the purpose of attracting men. (*Pearce v. Brooks*, L. R. 1 Ex. 213.) It is not necessary in order to preclude persons letting or selling to prostitutes from recovering rent, hire, or price that the plaintiff should have looked expressly to the proceeds of prostitution for payment. (*Id.*)

consideration they cannot be recovered on.

But a person selling goods to a prostitute not evidently purchased to enable her to carry on prostitution, is not precluded from recovering the price. (*Bowry v. Bennet*, 1 Camp. 348.) So, where the plaintiff has been employed to wash clothes, consisting principally of expensive dresses, for a prostitute, knowing her to be such. (*Lloyd v. Johnson*, 1 B. & P. 430.) So, a person letting rooms, not knowing they were to be used for the purpose of prostitution. (*Smith v. White*, *supra*.)

A bond or agreement given in consideration of future illicit cohabitation is illegal, but a bond or deed for payment by way of provision after *past* cohabitation is valid (*Nye v. Mosely*, 6 B. & C. 133); though a simple contract founded thereon is not, as there is no consideration. (*Binnington v. Wallis*, 4 B. & Ald. 650; *Beaumont v. Reece*, 8 Q. B. 483.)

(a) By Order XVI. r. 6, of the new rules, infants may sue as plaintiffs by their next friends, in the manner heretofore practised in the Chancery Division, and may in like manner defend by their guardians. See the full text of Order XVI. set out in the Appendix, as to the appointment of guardians *ad litem*, and so forth.

The question of the liability of infants is now mainly regulated by the 37 & 38 Vict. c. 62 (1874). The 1st section provides that "all contracts whether by specialty or simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void, provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." And by sect. 2, "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made

Infants not now liable on any contracts except for necessities.

during infancy, where there shall not be any new consideration for such promise or ratification after full age."

What are
"necessa-
ries."

It will be seen that the first section of this Act excepts "necessaries," which are generally defined to be food, drink, apparel, lodging, and education; but much depends on the fortune and position of the infant, and proof of such fortune, &c., lies on the plaintiff. (*Ryder v. Wombwell*, L. R. 4 Ex. 32, Ex. Ch., reversing decision in S. C. in the Exchequer.) Dinners, fruit, and confectionery supplied to an undergraduate out of college are not *prima facie* necessaries as coming under the head of "meat." Matters of mere ornament, such as gold rings, betting-books, &c., are not within the rule as to necessaries suitable to one's condition. Mere luxuries, such as cigars, are not, in the absence of special circumstances, to be regarded as necessaries. (*Bryant v. Richardson*, L. R. 3 Ex. 93 n., and see *Ryder v. Wombwell*, *supra*.)

Necessaries for an infant's wife are on the same footing as those for himself. (*Turner v. Treaby*, 1 Str. 168.)

It is no defence to an action for necessaries that the infant had an allowance sufficient to buy all necessaries with ready money. (*Burghart v. Hall*, 4 M. & W. 727.) Nor is evidence admissible to show that the infant had a sufficient supply of necessaries. (*Ryder v. Wombwell*, L. R. 3 Ex. 90, Bramwell, B., *dissentiente*.)

Infant not
liable on
an account
stated even
for neces-
saries.

Before the passing of 37 & 38 Vict. c. 62, above referred to, it was held that an infant was not liable on an account stated even for necessaries, and that such account was not admissible as an admission that necessaries to the amount shown had been supplied (*Ingledew v. Douglas*, 2 Stark. 36); nor at law for money lent, though laid out in purchasing necessaries (*Robart v. Knouth*, 2 Esp. 28), though in equity it might be otherwise (Chitty on Contracts, p. 148); nor on a bill of exchange for amount of necessaries. (*Williamson v. Watts*, 1 Camp. 552.) Though the above Act excepts contracts, &c., for necessaries from its operation, yet as it does not expressly alter the former state of the law, but only provides that such contracts are not within the enactment, these decisions do not seem to be disturbed.

A person is liable on a bill accepted by him after attaining his majority, though drawn before. (*Stevens v. Jackson*, 4 Camp. 164.) But where goods not necessaries ordered by an infant are delivered to a carrier for him before majority, but do not reach him until after, he is not liable. (*Griffin v. Langfield*, 3 Camp. 254.)

A promise to marry is within the 37 & 38 Vict. c. 62, and a defendant is not liable for a promise to marry made while he was an infant though he ratified it upon attaining his majority. Where a promise after the age of twenty-one is proved it will be a question for the jury whether the promise was a mere ratification of the promise made during infancy or a new promise. (See *Corhead v. Mullis*, 3 C. P. D. 439; *Northcote v. Doughty*, 4 C. P. D. 385; *Ditcham v. Worrall*, 5 C. P. D. 410.)

Infant
liable for a
tort, but
not on a
contract
founded on
tort.

An infant is liable for all torts committed by him. And where an action, though in form *ex contractu*, is in fact founded on tort, as where an infant is sued for money had and received in a case where such money has been fraudulently appropriated or embezzled by him, infancy is no defence. (*Bristow v. Eastman*, 1 Esp. 172; *Burnard v. Haggis*, 83 L. J. C. P. 189.) But if the action is for a fraudulent misrepresentation, infancy is a defence. (*Liverpool Adelphi v. Fairhurst*, 9 Ex. 422.) An infant is not liable upon a warranty given by him. (*Houclott v. Haswell*, 4 Camp. 118.)

It is no answer to a plea of infancy that the defendant fraudulently represented himself to be of full age. (*Bartlett v. Wells*, 31 L. J. Q. B. 57.) But in an action against an infant who had obtained a lease of a furnished house on an implied representation that he was of full age, it was held that the lease must be declared void and the possession given

Infants (a).

Wardship of Infants and Care of Infants' Estate.

1. By will dated August 10, 1882, A. devised Whiteacre and £10,000 to defendant, on trust for plaintiff.
2. On August 15, 1882, A. died.

up, and that the defendant should be restrained by injunction from parting with the furniture, but that he was not liable for use and occupation. (*Lempriere v. Lange*, 12 Ch. D. 675.) It is not competent to a plaintiff to treat a breach of contract as a tort for the purpose of suing the infant upon it. (*Jennings v. Randall*, 8 T. R. 335.)

(a) In default of any sufficient protection, the Chancery Division has jurisdiction to appoint a guardian to any infant, but this jurisdiction is not exercised unless the infant is possessed of some property.

Guardian-ship and custody of infants.

By statute 36 Vict. c. 12, jurisdiction is conferred upon the Court to allow a mother as against the father the custody of her children up to the age of 16 years. The same statute validates agreements contained in separation deeds for giving the custody of children to the mother, unless the Court sees that the agreement is against the interest of the children. As to the nature and extent of a father's right to the custody of his children, see *In re Goldsworthy*, 2 Q. B. Div. 75; *In re Beaufort*, 11 Ch. Div. 508; *In re Agar-Ellis*, 10 Ch. Div. 49.

Wide powers for the management of the land of infants, and for the receipt and application of the income thereof, have been conferred on trustees by the Conveyancing and Law of Property Act, 1881, sect. 42, and by sect. 43 of the same Act—

(1) Where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of 21 years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not.

Powers of trustees for infants.

(2) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations or any part thereof, as if the same were income arising in the then current year.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

(4) This section applies whether that instrument comes into operation before or after the commencement of this Act.

If the vesting of the property is postponed until the infant attains the age of 21 years, this section does not apply.

The Court has jurisdiction to charge reversionary property of infants with money required for their maintenance, even where none of the

3. On August 30, 1882, probate was granted to the defendant, the sole executor.

4. The plaintiff is an infant 12 years old.

The plaintiff claims :—

- (1.) That the plaintiff may become a ward of Court ;
- (2.) Administration of the trusts of the will of A. so far as necessary.

Innkeeper (a).

1. *Claim against an Innkeeper for Loss of Guest's Luggage.*

1. The plaintiff has suffered damage by the defendant, who is a common innkeeper at Wycombe, failing to keep

When
infants
become
wards of
Court.

infants for whose benefit the money is raised may ultimately become entitled in possession to the property charged (*De Witte v. Palin*, L. R. 14 Eq. 241.) As to the circumstances under which the Court will make an order for an allowance for past maintenance, see *Brown v. Smith*, 10 Ch. Div. 377. An order for the maintenance of an infant without suit constitutes the infant a ward of Court (*Re Graham*, L. R. 10 Eq. 530). In a later case, *De Penda v. De Mancha*, 19 Ch. Div. 451, the payment of moneys into Court in an administration action to the separate account of the infant was held sufficient to constitute the infant a ward of Court, although she was not a party to the administration action.

The mar-
riage of
wards.

The Court watches over the marriages of its wards with jealousy. An improper marriage will be restrained by injunction, and to marry a ward of Court without the consent of the Court is a high contempt of Court, which it punishes by imprisonment, and by insisting on a proper settlement being made. The parties seeing the marriage of a ward of Court should always petition for the approval of the Court, which, if the match on inquiry be found suitable, will be given and a settlement directed.

By statutes 18 & 19 Vict. c. 43, and 23 & 24 Vict. c. 83, male infants of the age of 20 years and female infants of the age of 17 years are enabled, with the approbation of the Court, to make binding marriage settlements of their property.

Innkeepers
insurers at
common
law.

(a) At common law an innkeeper seems to be under a greater liability for loss of or injury to the goods of guests than an ordinary bailee for hire. Whether he is an absolute insurer of the safe custody of the goods, in the same sense that a common carrier is an insurer, is perhaps not altogether free from doubt, but the better opinion seems to be that his common law liability must be placed as high as this. On the one hand, in the case of *Dawson v. Chamney*, 5 Q. B. 164, the Court was disposed to place the liability of an innkeeper upon the ground of negligence merely ; but in the later case of *Morgan v. Racey*, 6 H. & N. 265, it was laid down generally that an innkeeper, though guilty of no negligence, is liable for the loss of or injury to goods of his guest where such loss is not due to the act of God or the Queen's enemies, or the contributory negligence of the guest himself.

This extended responsibility has, however, been much cut down by the legislature. By the 26 & 27 Vict. c. 41, s. 1, no innkeeper shall be liable

safely a portmanteau containing wearing apparel, brought by the plaintiff into the defendant's inn while he was a guest there.

to make good to any guest any loss of or injury to property brought to the inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage), to a greater amount than £30, except in the following cases :—(1) Where the property shall have been stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper, or any servant in his employ. (2) Where the property shall have been deposited expressly for safe custody with the innkeeper; provided that in case of such deposit the innkeeper may require as a condition of his liability that the property be deposited in a box or other receptacle fastened and sealed by the person depositing it. By sect. 2, if an innkeeper shall refuse to receive for safe custody any property of his guest, or if the guest shall, through any default of the innkeeper, be unable to deposit his property, the innkeeper shall not be entitled to the benefit of the Act in respect of such property. By sect. 3, every innkeeper is bound to cause at least one copy of sect. 1 of the Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance of his inn, and is to be entitled to the benefit of the Act in respect of such property only as shall be brought to his inn while such copy is so exhibited. An "inn" means under the Act any hotel, inn, tavern, public-house, or other place of refreshment the keeper of which is by law responsible for the property of his guests (sect. 4).

Statutory protection of innkeeper.

It has been held that the word wilful in the words "wilful act, default, or neglect" in the 1st section, must be read with "act" only, and not with "default" or "neglect." (*Squire v. Wheeler*, 16 L. T. N. S. 93, *per* Byles, J.)

A mere verbal error in the copy of sect. 1 of the Act will not vitiate the notice so as to make it ineffectual, provided the notice states correctly the provisions of the Act; but the omission of a material portion of the statute will render the notice ineffectual to protect the innkeeper. (*Spice v. Bacon*, 2 Ex. Div. 463; 46 L. J. 713, App.) And the accidental omission of the word "act" in the recital of the first section of the Act was held to be a material omission. (*Ib.*)

How it may be lost.

An innkeeper is bound at common law to receive persons who present themselves as guests at any hour of the day or night, provided they offer themselves in a proper condition to be received into the inn and are ready to pay for the accommodation, and provided there is room to accommodate them; but he is at liberty to set up an inn for the reception of a particular class of persons, and in such a case he is only bound to do what he publicly professes to do. (See *per* Parke, B., in *Johnson v. Midland Railway Co.*, 4 Ex. 373.) Coffee-house keepers who do not profess to lodge guests, boarding-house keepers, lodging-house keepers, and the owners of public-houses who do not let bed-rooms, are not innkeepers at common law. To constitute a person an innkeeper, he must profess to entertain and lodge all travellers. A refreshment bar is not an inn (*Ileg. v. Rymer*, 2 Q. B. D. 136); nor a refreshment room at a station (*Straus v. Carlisle County Hotel Co.*, W. N. 1883, p. 192).

Who are innkeepers.

The innkeeper is the person liable, and not a manager in whose name the licenses have been taken out. (*Dixon v. Birch*, L. R. 8 Ex. 135.) The plaintiff, in order to recover against the innkeeper on his common law liability, must prove that he was a guest in the inn at the time the loss happened. But a man may be a guest, though he is only in the inn for temporary refreshment (*Bennett v. Mellor*, 5 T. R. 273), and it is not essential that he should lodge in the inn for a single night.

If the loss of the goods has been brought about by the contributory

2. In the alternative, the said portmanteau was stolen by reason of the negligence of the defendant in failing to provide proper bolts and bars for the door of the plaintiff's bedroom at the said inn.

Particulars of damage :—

[*Here set out articles in portmanteau, and their value.*]

The plaintiff claims £80 damages.

Defence.

1. The plaintiff was never received into the defendant's inn as a guest, and he was not a guest therein at the time of the alleged loss of the portmanteau.

2. The defendant does not admit that the said portmanteau was stolen.

3. The defendant denies that he was guilty of any negligence in connection with the custody of the said portmanteau.

4. The said portmanteau and its contents were property brought to the defendant's inn within the provisions of the 26 & 27 Vict. c. 41, section 1 of which Act, at the time when the plaintiff says he was received as a guest into the defendant's inn, was exhibited in a conspicuous part of the hall thereof.

2. Claim against an Innkeeper for Injury to Goods.

1. On the 8th of September, 1880, the plaintiff became a guest at the defendant's inn at Barnet.

2. While he was a guest certain of the defendant's servants burnt and much injured several valuable maps, plans and

negligence of the plaintiff, he cannot recover from the defendant, as where in a case where a lock and key were provided the plaintiff went to bed without locking the door, and left his money in his trousers pockets on a chair by his bedside. (*Oppenheim v. The White Lion Hotel Co.*, 40 L. J. C. P. 231 ; L. R. 6 C. P. 515.)

The inn-keeper's lien and right of sale under it.

An innkeeper has a lien for his charges upon all goods brought by the guest to his inn ; but until recently he could merely retain the goods until payment. He might not sell them and satisfy his debt. However, by the 41 & 42 Vict. c. 38, which came into operation on the 8th August, 1878, an innkeeper may sell the goods on which he has a lien, provided (1) he keeps them six weeks before doing so, and (2) advertises the sale as directed by the Act a month before the sale. An innkeeper retaining the goods of his guest by virtue of his lien is not bound to use greater care in their custody than he uses as to his own goods of a similar description. (*Angus v. McLachlan*, 23 Ch. D. 330.)

drawings which formed part of the property which the plaintiff brought to the said inn.

3. In the alternative, the defendant received the said maps, plans, and drawings from the plaintiff as a bailee thereof, and they have been burnt and injured through the carelessness of the defendant's servants.

Particulars :—

[*Set them out.*]

The plaintiff claims £100 damages.

Defence.

1. The defendant denies that the plaintiff ever brought the said maps, plans, and drawings into the inn, and that he ever received them either as an innkeeper or a bailee.

2. He further denies that his servants burnt them.

3. If the said articles were brought to the defendant's inn, they were property within the meaning of the 26 & 27 Vict. c. 41, s. 1, the benefit of which Act the defendant is entitled to.

4. The defendant brings into Court the sum of £30, and says that the same is sufficient to satisfy the plaintiff's claim herein.

Reply.

1. The plaintiff joins issue upon the defence.

2. As to the 3rd paragraph, the plaintiff says that the defendant, during the time the plaintiff was a guest at his inn, failed to exhibit section 1 of the said Act in a conspicuous part of the hall or entrance to the said inn.

3. The said property was lost and injured through the wilful act, default, or neglect of the defendant's servants.

Rejoinder.

The defendant joins issue upon the reply.

Insanity (a).*Defence of Insanity to an Action on a Contract.*

The defendant, at the time when he made the alleged agreement [or executed the said deed, or accepted the said bill, or as the case may be], was of unsound mind, as the plaintiff then well knew.

Insurance—I. Marine Policies (b).*1. Claim for a Total Loss on a Voyage Policy.*

1. The plaintiff was interested at the time of insurance and time of the loss to the amount of £500, under a marine policy

Contracts with insane persons.

(a) If a contract is made with a person of unsound mind, with knowledge of the fact by the other party, such contract cannot be enforced against him. If, however, such party was ignorant of the insanity, and the transaction was fair and *bonâ fide* on his part, the contract will be valid. See *Molton v. Camroux*, 2 Exch. 487; 4 Exch. 17; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; *Read v. Legard*, 6 Exch. 637; L. J. 20 Exch. 309; *Beaven v. McDonnell*, L. J. 23 Ex. 326; 9 Exch. 309.

(b) Marine insurance is a contract by which the insurers, called underwriters, undertake, in consideration of a certain sum of money called the premium, to indemnify the assured against any loss which he may actually sustain, not exceeding a specified sum, upon ship, goods, or freight, as the case may be, either during a certain voyage or for a certain time. In the former case the policy is called a voyage policy; in the latter, a time policy.

The insured must have a pecuniary interest.

The party entering into a contract of marine insurance must have some *bonâ fide* pecuniary interest in the subject-matter of insurance. He must have what is called an insurable interest, and this interest must exist not only at the time of entering into the policy but also at the time of the loss.

Marine insurance, a contract of indemnity.

Marine insurance is generally spoken of as a contract of indemnity merely, but in some cases the assured may receive more than a perfect indemnity. (See the judgment of Lord Blackburn in *Aitchison v. Lohre*, 4 App. Cas. 763.) Still marine insurance is generally merely a contract for indemnity; and it follows from this, that if the assured never had any interest in the subject-matter of insurance, or if his interest did not continue till the loss happened, he sustains no injury by the happening of the loss, and there is nothing for which to indemnify him. Another result which follows from the doctrine that the assured must have an insurable interest is this. He can only recover from the underwriters to the extent of his insurable interest. It may be that in consequence of insuring with a number of underwriters the total amount written on the aggregate of the policies he holds is in excess of the value of the subject-matter of insurance, but this will be no advantage to the assured. He must not make a profit out of the common misfortune of the underwriters and himself; and he can only recover against any one or all of the underwriters the actual loss he has suffered. He is not, however,

Consequences of this.

of insurance for that amount dated the 1st day of June, 1880, on the ship "Hero," subscribed by the defendant for £500.

2. Particulars :—

- (1) Valued at £20,000 ;
- (2) Voyage : at and from Cardiff to Valparaiso ;

bound to apportion the loss among the different underwriters, and can proceed against one of them and recover the total amount from him, provided he has underwritten the policy to that amount. In that case it will be for the underwriter who has had to pay all the loss to come upon the other underwriters who have insured the same risk for contribution.

Insurable interest.—In the statement of claim it was necessary expressly to aver the fact of the plaintiff's interest in the ship, goods, or freight insured, and the averment was that the plaintiff was interested at the time of the making of the contract (except, of course, where an assignee of a policy is suing, then an allegation of the assignor's interest at the time will do), and also at the happening of the loss. And it is submitted that it is still proper to aver the interest both at the time of contract of insurance and of the loss.

What constitutes an insurable interest.

Ship-owners have an insurable interest in their ship. Upon the principle already stated, where they assign away their interest in the ship before the loss, they cannot recover except as trustees for the assignee, and this only where there has been an agreement that the policy should be kept alive for the benefit of the latter (*Powles v. Innes*, 11 M. & W. 10) ; but an assignment by way of mortgage, though in terms absolute, will not prevent the assured from recovering. (*Ward v. Beck*, 13 C. B. N. S. 668 ; L. J. 32 C. P. 113.) A person who lends money for the repair of a ship has no insurable interest in it, and an hypothecation of a ship by a master gives no insurable interest to the creditor. (*Stainbank v. Shepard*, 13 C. B. 418 ; L. J. 22 Ex. 341.) A mere equitable interest in goods is an insurable one (*Hill v. Secretan*, 1 B. & P. 315) ; and a lien on goods is insurable. (*Briggs v. Merchant Traders' Insurance Ass.*, 13 Q. B. 167.) The interest of a shipowner on the profit expected from carrying his own goods is properly described and insured as freight. The purchaser of a cargo of rice, which is to be loaded on board of a ship expected to arrive at a certain port, where it is to load for a voyage, he agreeing to pay a sum certain, has no insurable interest in the purchase, so that should the rice put on board be lost before the loading is completed, he cannot recover on a policy of insurance effected on goods in the vessel. (*Anderson v. Morice*, 1 App. Cas. 713 ; *Flint v. Flemyng*, 1 B. & Ad. 45 ; *Deaux v. F'Anson*, 5 N. C. 519.)

Insurance of freight.

The assignee of a policy stands upon the interest which his assignor had at the inception of the risk, and his own interest at the time of the loss.

Beginning and end of the risk.—This differs whether the policy is a time or a voyage policy, though a policy may be both a voyage policy and a time policy. (*Gambles v. Ocean Marine Co.*, 1 Ex. Div. 141.) If the former, the risk begins at the first date and ends with the last date, and the underwriters are only liable if the loss happens on or between these dates. In the case of a voyage policy, the risk begins when the insurance is on a voyage "at and from," as soon as the ship is geographically within the port (*Maughton v. Empire Marine Insur. Co.*, 1 B. 1 Ex. 206) ; or, at the beginning of the voyage when the insurance is "from" the port. (*Small v. Gibson*, 16 Q. B. 156 ; L. J. 20 Q. B. 152, Ex. Ch.) The risk in the case of a voyage policy on the ship terminates in general at the end of twenty-four hours after mooring in safety in

When the risk begins and when it ends.

- (3) Premium to defendant : £3 per cent. ;
- (4) Perils insured against causing loss : of the seas ;
- (5) Loss : total.

The plaintiff claims £500.

When the risk begins.

port, but where during the twenty-four hours the ship is compelled to go back for performance of quarantine, the risk continues. (*Waples v. Eames*, 2 Str. 1243.) In the case of goods, the risk depends on the agreement of the parties, but it usually begins with the loading on board, and ends with the safe discharge, including their passage to the shore by usual means. (*Twiney v. Etherington*, 1 Burr. 348.) The risk on insurance of freight begins when the goods or part are on board, or the ship is at the port of loading in a condition to take them on board. (*Foley v. United Fire, &c., Insur. Co.*, L. R. 5 C. P. 155; *Jones v. Neptune Marine Insur. Co.*, L. R. 7 Q. B. 702.)

Usual losses covered.

The loss.—There must be an averment that there was a loss of part or all the subject-matter of insurance by the perils insured against. These perils are enumerated in the particular policy ; but the usual perils insured against in marine policies are all perils of the seas, loss by fire, by capture, loss by restraint of princes, loss by barratry, and then follow general words, "all other perils, losses, and misfortunes ;" but on the principle that general words of the kind are to be taken as *cjunctum generis* with those that have gone before, these words only refer to perils, losses, and misfortunes of a like nature to those already enumerated.

Effect of "lost or not lost."

If the insurance is with the words "lost or not lost," it will attach, although the subject-matter had been in fact lost at sea at the time of insurance, provided the party insured was then ignorant of the loss. (3 Kent Com. 258, 259; *Mead v. Davieson*, 3 Ad. & E. 303.) In determining whether a particular loss is within the perils insured against, the proximate and not the remote cause of loss is to be regarded. But where the insurance is against perils of the sea, and mischief is occasioned by the sea, the natural and unavoidable consequence of which is to cause a farther mischief, the consequential injury also is a peril of the sea, as where the sea-water damages part of a cargo, which thereby becomes putrid so as to injure another part of the cargo in contact with it. (*Montoya v. London Assur. Co.*, 6 Exch. 451; L. J. 20 Ex. 254.) A loss by perils of the sea, though remotely caused by the negligence of the crew, is within the policy. (*Walker v. Maitland*, 5 B. & A. 171; *Bishop v. Pentland*, 7 B. & C. 219.) So a loss occasioned by the mistake of the master, provided he was a person of competent skill when the policy was effected. (*Phillips v. Headlam*, 2 B. & Ad. 380.) So though the ship was damaged by negligent loading, and became leaky, and was run ashore to prevent sinking. (*Redman v. Wilson*, 14 M. & W. 476.) A ship never heard of after sailing is presumed to have foundered at sea. (*Green v. Brown*, 2 Str. 1199.) It is sufficient to prove that the ship has not been heard of in the country from which she sailed, without calling witnesses from the port of destination to prove that she never arrived there. (*Twemlow v. Oswin*, 2 Camp. 85.) The time within which a missing ship will be presumed lost must depend on the circumstances of the case; and in *Houston v. Thornton*, Holt, N. P. 242, a ship which had sailed on a seven weeks' voyage, and had not been heard of for eight or nine months, was presumed to be lost. Though a ship is burned by the negligence of the master and mariners, this is a loss by fire within the policy for which the underwriters are liable (*Busk v. R. Exch. Assur. Co.*, 2 B. & A. 73); but on an insurance of goods, if the goods are burnt in consequence of

What are "perils of the sea."

When a ship never heard of is supposed to have foundered.

2. Another Claim for a Total Loss on a Voyage Policy.

1. On the 5th of May, 1880, the plaintiffs effected with the defendant a policy of marine insurance for £100 against the

being put on board in bad condition, this, being occasioned by the insurer's own act, would not be a loss by fire within the policy. (*Boyd v. Dubois*, 3 Camp. 133.) As to what amounts to a loss by restraint of princes, see *Aubert v. Gray*, L. J. 32 Q. B. 50; *Bruce v. Nicopulo*, 11 Exch. 129; L. J. 24 Ex. 321; *Rodocanachi v. Elliott*, L. R. 8 C. P. 649, and in Ex. Ch. L. R. 9 C. P. 518; *Geipel v. Smith*, L. R. 7 Q. B. 404.

There is usually a memorandum on marine policies protecting the insurer from claims for loss on certain articles, or from liability to particular average "unless the ship be stranded;" and in a great number of cases there has been a keen contest as to what constitutes a stranding. The fact that the ship struck or took the ground is not enough; she must be stationary for some little time, as twenty minutes. (*Baker v. Tincry*, 1 Stark. 436.) "A stranding," said an eminent judge, "may be said to take place where a ship takes the ground not in the ordinary course of navigation, but by reason of some unforeseen accident. If therefore the ship takes the ground in the ordinary and usual course of navigation and management in a tidal river or harbour, upon the ebbing of the tide or natural deficiency of water, so that she may float again upon the flow of the tide or increase of water, such an event is not a stranding." (*Per Lord Tenterden*, in *Wells v. Hopwood*, 3 B. & Ad. 34.) If, however, there be a stranding, and the goods were on board at the time, the policy applies, though the loss or injury to the goods was not caused by the stranding, but by some other cause. (*Ibid.*)

What constitutes a stranding.

A loss may be total or partial; and a total loss may be either actual or constructive. A total loss is where the subject-matter of insurance is either totally destroyed or is so damaged as to be worthless, and the adventure is thereby totally frustrated. (*Roux v. Salceder*, 3 N. C. 266.) A constructive total loss is where the thing insured, though still existing in fact, is lost for all useful purposes, so as to justify the insured in abandoning all his interest in it to the insurer, and claiming as for a total loss. (See *Roux v. Salceder*, *supra*; *Naylor v. Tuglor*, 9 B. & C. 718; *Holdsworth v. Wise*, 7 B. & C. 794.) Notice of abandonment must be given to the underwriters, unless there is no part of the subject-matter of insurance remaining which on abandonment can be of any value to the underwriters. (*Rankin v. Potter*, 6 H. L. Cases, 83; *Farnworth v. Hyde*, 18 C. B. N. S. 835; L. J. 34 C. P. 207.) It need not be in writing, but it must be certain, it must be unconditional and unqualified (*McMasters v. Shoolbred*, 1 Esp. 239); and it must be given as soon as possible. (*Hunt v. R. Erch. Assurance Co.*, 5 M. & S. 47; *Kaltenbach v. Maokenzie*, 3 C. P. D. 467.)

Losses divided into total and partial; and total into actual and constructive.

Calculation of the loss.—Where the policy is a valued one—the estimated value of the subject-matter of insurance stated on the face of it—and the loss is total, there is no difficulty about calculating the loss, and the assured is only bound to prove some interest in the ship or goods, in order to take the case out of the statute 19 Geo. 2, c. 37, for ever since that statute, the usage has been to permit the valuation fixed on the policy to stand, unless the defendant can show that the plaintiff had a colourable interest only, or that he has greatly overvalued the goods. Acting on this principle, in *North of England Insurance Association v. Armstrong*, 5 Q. B. 244, where a policy was effected for £6000 on the ship *H.* valued at £6000, and she was run down and sunk by another ship, and the underwriters paid the owners £6000 as for a total loss, it

Notice of abandonment.

When policy valued and loss total, how loss calculated.

ordinary risks, including all perils of the seas, upon the ship "St. James," valued at £10,000, at and from A. to B.

2. The plaintiffs were interested in the said ship to the

When loss
partial
though
policy
valued.
When
policy open.

was held that a sum of £5000 which the owners subsequently recovered against the other vessel belonged to the underwriters, although the real value of the "H." was £9000. If the loss is *partial*, though the policy be valued, the plaintiff is bound to prove the value of the goods in the same way as if the policy were an open one. (*Irving v. Manning*, 1 H. L. C. 287.) The rule in the case of an *open* policy is to estimate the actual value of the subject insured at its actual or market value at the commencement of the risk; and if the claim be for repairs of a ship, the full cost of repairs will not be allowed, because the owner substitutes new for old materials. (*Poingdestre v. R. Erch. Assur. Co.*, Ry. & M. 378.) A deduction of one-third new for old, as it is called, will be made, unless the ship is on her first voyage (*Pirie v. Steele*, 2 M. & Rob. 49); or perhaps if she is an iron ship. (*Lidgett v. Secretan*, L. R. 6 C. P. 616, 627.) See also *Pitman v. Universal Marine Insurance Co.*, 9 Q. B. D. 193 (C. A.).

"Suing and
labouring"
clause.

It must be noticed, however, that besides the amount actually subscribed for by the underwriters, they may become liable for average losses, and, under the suing and labouring clause, for moneys expended in and about the attempting to save or recover the subject insured, if properly claimed in the statement of claim. (*Le Cheminant v. Pearson*, 4 Taunt. 367.)

The underwriters when, in the case of a total loss, they have paid to the assured the amounts for which they subscribed the policy, are entitled to the subject-matter of insurance for whatever it may be worth, and they stand in the shoes of the assured to the extent that they may bring any actions for their own benefit arising out of the loss which the assured might have brought, and any damages which the latter may recover against third persons for the loss of or injury to the vessel or cargo belong to them. (*North of England Insurance Co. v. Armstrong*, 5 Q. B. 244.) But they have no higher rights than the assured, in whose place they stand, would have, and if the assured cannot recover neither can they. (*Simpson v. Thompson*, 3 App. Cas. 279.) See also, in this connection, as to the rights of underwriters, *Burnand v. Rodocanachi*, 7 App. Cas. 333.

A strict
compliance
with ex-
press war-
ranties
must be
averred.

Warranties.—There are in the case of all policies of marine insurance certain warranties by the assured, some express, others implied. These warranties are in the nature of conditions precedent. Their performance need not now be averred in the statement of claim, but any particular warranty, the breach of which is relied on, must be specially pleaded as a defence in the statement of defence. Where the policy contains an express warranty, a literal and strict compliance with it must be proved, and it is not sufficient to show something tantamount to a performance of it, unless there be a waiver or dispensation of performance. (*Weir v. Aberdeen*, 2 B. & A. 320; *Crookewit v. Fletcher*, 1 H. & N. 893; L. J. 26 Ex. 153.)

Implied
warranties
of seawor-
thiness and
against
deviation.

The chief implied warranties are that there shall be no deviation from the voyage insured, and that the ship (in the case of a *voyage policy*) is seaworthy at the commencement of the risk; and a breach of one or other of these warranties avoids the policy, although there has been no fraud. Any deviation from the voyage insured is fatal, although no loss happens in consequence of the deviation, and although the loss in respect of which the underwriters are sought to be made liable did not occur till *after the vessel had returned to the regular course of the voyage*. A deviation does not discharge the insurer from liability for previous loss, but only for

amount insured at the time of the said insurance, and also at the time of the loss.

3. The said ship, while on the said voyage, became a total loss by the perils of the seas.

The plaintiff claims £100.

loss accruing after the deviation. (*Green v. Young*, 2 Lord Raym. 840.) All deviations by reason of inevitable accident or stress of weather, to obtain needful provisions or to do needful repairs, or avoid capture, are implied exceptions to this warranty (*Urquhart v. Barnard*, 1 Taunt. 456); but though a deviation for the purpose of saving life would be justifiable, a deviation merely to succour a vessel and save property would probably not be an exception from the warranty. (See *Laurance v. Sydebottom*, 6 East, 54; *The Jane*, 2 Hagg. Am. Rep. 345; 3 Kent Com. 313; *Scaramanga v. Scamp*, 48 L. J. C. P. 478.) With respect to the implied warranty of seaworthiness it is meant that the ship shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils or the voyage insured at the time of sailing on it, and having regard to the particular subject-matter of the insurance. (*Daniels v. Harris*, L. R. 10 C. P. 1.) But the assured makes no warranty that the vessel shall continue seaworthy; or that the master or crew will do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy where the loss has been immediately occasioned by the perils insured against. (*Dixon v. Sadler*, 5 M. & W. 414.) Where a ship is unseaworthy when she sails on her voyage, the policy is there and then avoided, and it is not set up again by her becoming seaworthy during the course of the voyage. (*Quebec Marine Insur. Co. v. Commercial Bank of Canada*, L. R. 3 P. C. 234.) Not only does the ship-owner warrant that his ship is seaworthy, but the owner of goods the subject of insurance loaded on board ship, warrants that the ship is seaworthy (*Biccard v. Shepherd*, 14 Moo. P. C. 494); and if the ship turns out to have been unseaworthy, the owner of the goods cannot recover against the underwriters. There is, however, no implied warranty as to the goods themselves that they are seaworthy for the voyage. (*Knebel v. Saunders*, 17 C. B. N. S. 71; L. J. 33 C. P. 310.)

What is a deviation.

What constitutes unseaworthiness.

Owner of insured goods warrants the ship is seaworthy.

It is now finally settled that this rule requiring seaworthiness at the commencement of the risk only applies to *voyage* policies. In the case of time policies there is no implied warranty of seaworthiness. (*Dudgeon v. Pembroke*, 2 App. Cas. 284; 46 L. J. (H. L.) 409.)

In time policies no implied warranty of seaworthiness.

Where in a time policy the ship was warranted "free from capture and seizure, and the consequences of any attempt thereat," and in consequence of the barratrous act of the master in smuggling, the vessel was seized by Spanish revenue officers, it was held that the loss must be ascribed to "capture and seizure," and not to the barratry of the master, and that the underwriters were not liable. (*Cory v. Burr*, 8 App. Cas. 393.)

Action by assignee.—By the 31 & 32 Vict. c. 86, s. 1, it is enacted that an assignee of a policy of insurance may sue thereon in his own name, and that the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected. But in *Pellaz v. The Neptune Marine Insur. Co.*, 49 L. J. 153, it was held by the Court of Appeal that in an action on a policy of insurance on a ship's cargo brought by the assignee in his own name, pursuant to the provisions of the 31 & 32 Vict. c. 86, the defendant cannot set off any debt which he could not have set off prior to the passing of that Act, nor in the opinion of the Court did

3. Claim for Total Loss on a Voyage Policy, and also for an Average Loss, and upon the Suing and Labouring Clause.

1. On the 5th of May, 1880, the plaintiff effected with the defendant a policy of marine insurance against the ordinary risks, including all losses by the perils of the seas and fire, upon

Order XIX. r. 3 alter the law in that respect, for a counter-claim is not a defence within the meaning of sect. 1 of the 31 & 32 Vict. c. 86.

The assured bound to communicate all material facts.

*Defences—(concealment).—*If the assured conceals any material fact which relates to the risk insured, the policy is void (*Carter v. Boehm*, 3 Burr. 1905; *Russell v. Thornton*, 6 H. & N. 140); and it makes no matter though the fact were once known to the underwriter, if it was not present to his mind at the time of effecting the insurance. (*Bates v. Hewett*, L. R. 2 Q. B. 595.) When the insurance was effected by the principal personally, and he had no knowledge of any material fact which he concealed, but his agent abroad had and designedly forbore communicating it to his principal in order that the latter might be enabled to effect an insurance, it was held that the concealment of the agent vitiated the policy. (*Proudfoot v. Montefiori*, L. R. 2 Q. B. 511.) The assured is bound to communicate all the information he has received, though he does not know it to be true, and though it afterwards turns out to be false. It is important to notice, however, that by mercantile usage the signing of the slip, not the delivery out of the policy, is the making of the contract. Hence it is only facts known to the assured at the former time that he is bound to communicate; and anything coming to his knowledge before the delivery out of the policy, though after the signing of the slip, he is not compelled to disclose. (*Lishman v. N. Maritime Insur. Co.*, L. R. 8 C. P. 216; aff. in Ex. Ch. L. R. 10 C. P. 179; *Cory v. Patton*, 7 Q. B. 304; 9 Q. B. 577. See also on this subject, *Morrison v. Universal Marine Insur. Co.*, L. R. 8 Ex. 197; *Lynch v. Hamilton*, 3 Taunt. 37.) It is sufficient to communicate facts without the opinion or conclusions founded upon those facts. (*Bell v. Bell*, 2 Camp. 479.) Mere rumours or news in the public papers need not be communicated (3 Kent Com. 285), nor need facts which the underwriter is presumed to know, as that a ship classed A. 1 at Lloyd's will be struck off the list unless re-surveyed in the fourth year from the registration. (*Gandy v. Adelaide Marine Insur. Co.*, L. R. 6 Q. B. 746.)

But not rumours, nor opinions and conclusions, &c.

Any material misrepresentation avoids the policy.

Misrepresentation.—Any misrepresentation of a material fact by the assured to the underwriters at the time of entering into the contract avoids the policy; and any misrepresentation made to the first of the underwriters is regarded as made to them all. (*Marsden v. Reid*, 3 East, 572; *Bell v. Carstairs*, 2 Camp. 543.) A material misrepresentation will vitiate the policy, though the actual loss is in no way connected with the misrepresentation, and though no fraud was intended by the insured. (*Seaman v. Fbnerau*, 2 Str. 1183.) If a representation is not a positive assertion, but only an expression of opinion, expectation, or belief, this will not avoid the policy, if the assertion is made *bona fide*, and in ignorance of the untruth. (*Barber v. Fletcher*, 1 Doug. 305; *Anderson v. Pacific, &c., Insur. Co.*, 21 L. T. N. S. 408, P. C.) It is sufficient, however, if the representation be substantially correct, and it need not, like a warranty, be strictly and literally complied with. (*Pandon v. Watson*, Cowp. 785.)

Any fraudulent statement

Fraud.—Any fraudulent statement made by the assured to induce the underwriters to accept the risk will avoid the policy. "If the representation was by a fraudulent design it avoids the policy without staying to

the ship "Queen," at and from London to Otaga, and the defendant subscribed the said policy for £200 on the said ship, valued at £15,000. The policy contained the usual suing and labouring clause.

2. While the said ship was upon the said voyage she was stranded at C. by perils insured against, and a particular average loss, amounting to £100, was caused thereby.

3. Afterwards, and while the said ship was upon the said voyage, a loss occurred within the meaning of the policy, and the plaintiff thereupon did sue and labour in and about the defence of the subject-matter of insurance, and necessarily incurred charges amounting to £70.

4. Afterwards, and while the said voyage still continued, the said ship was wholly lost by one of the perils insured against, viz., by fire.

5. The plaintiff, at all the times mentioned in this statement of claim, was interested in the said subject-matter of insurance to the amount subscribed by the defendant.

The plaintiff claims from the defendant the sums of £100, £70, and £200.

Defence.

1. The defendant denies that the said ship was stranded at C. by any of the perils insured against.

2. He denies that any particular average loss was then sustained.

3. A loss did not afterwards occur within the meaning of the policy, and the plaintiff did not sue and labour, in defence of the subject-matter of insurance, or incur any charges in connection therewith.

4. The said ship did not become a total loss by any of the perils insured against.

inquire into its materiality." (Kent Com. 283.) If goods insured are over-valued with intent to defraud the underwriters, the contract is void, and the assured cannot recover even for the value actually on board. (*Haigh v. De La Cuir*, 3 Camp. 319.) will destroy the policy.

Return of the Premium.—In many cases the assured may recover back from the underwriters the premium paid or some part of it, as where the policy was void *ab initio*, or the risk never commenced, or where the interest of the assured is less than the amount insured; but there can be no return where the policy is void for fraud or illegality, or where the risk has once commenced.

5. The defendant further says that the said ship was wilfully set fire to by the plaintiff, or by his orders.

6. The plaintiff was not interested in the subject-matter of insurance to the amount subscribed by the defendant at any of the times mentioned in the statement of claim.

7. The said ship was not of the value of £15,000, and was, at the time of insurance, over-valued by the plaintiff with the intention of defrauding the defendant.

Reply.

The plaintiff joins issue upon the statement of defence.

4. Claim for a Total Constructive Loss on a Time Policy.

1. On the 21st of March, 1880, the defendant subscribed, for the sum of £50, a policy of marine insurance upon the plaintiff's ship the "Mist," valued at £2000, and insured the same against the ordinary risks, including perils of the seas, from noon of the said 21st of March, 1880, to noon of the 3rd of April, 1880.

2. On the 23rd of March, 1880, the said ship, by the perils of the seas, became a constructive total loss, and notice of abandonment was duly given by the plaintiff to the defendant.

3. At all the times mentioned in this pleading the plaintiff was interested in the subject-matter of insurance to the amount subscribed by the defendant.

The plaintiff claims £50.

Defence.

1. The defendant denies that the said ship became a constructive total loss.

2. The plaintiff did not give the defendant notice of abandonment.

3. The plaintiff had ceased to have any interest in the subject-matter of insurance at the time of the alleged loss.

4. The defendant further says that he was induced to effect the said insurance by the concealment by the plaintiff of certain facts then known to the plaintiff and unknown to the

defendant, and which ought to have been communicated by the plaintiff to the defendant, viz. :—

[*Here set out briefly the material facts concealed.*]

Reply.

The plaintiff joins issue upon the statement of defence.

5. Claim for a Total Loss upon a Voyage Policy "Lost or not Lost."

1. The defendant, on the 13th of August, 1880, subscribed, for the sum of £500, a policy of marine insurance upon the plaintiff's ship the "Royal," valued at £10,000, and insured the same against the ordinary perils, including the perils of the sea, from Bombay to Southampton, lost or not lost.

2. During the said voyage the said ship became a total loss by the perils insured against.

3. The plaintiff was interested in the said ship to the amount insured by the defendant at all times material to this pleading. The plaintiff claims £500.

Defence.

1. The said ship was unseaworthy at the commencement of the said voyage.

2. The said ship was lost prior to the 13th of August, 1880, and the plaintiff when he effected the said policy with the defendant knew of the said loss but fraudulently concealed it from the defendant.

6. Claim upon a Voyage Policy in respect of Damage to Vessel.

1. On the 13th of April, 1879, the plaintiff effected with the defendant a policy of marine insurance against loss by the ordinary risks, including all perils of the seas, upon the ship "Durward," at and from C. to D., and the defendant subscribed the said policy for £150.

2. While the said ship was on the said voyage, by reason of the perils insured against, one of her boilers exploded, and she was greatly damaged. The defendant's proportion of the said

average loss in respect of the sum of £150 insured by him is £40.

3. The plaintiff was interested in the said ship to the amount subscribed at the time of the loss and at the time of entering into the said policy.

The plaintiff claims £40.

7. Claim by Shipper for a Total Loss of Cargo..

1. On the 2nd of May, 1880, the plaintiff effected with the defendant a policy of marine insurance upon a cargo of grain then on board of the "R.," valued at £3,000, and the defendant insured the same against all the ordinary perils, including loss by fire, at and from M. to N., to the extent of the sum of £200.

2. During the said voyage the said cargo was totally lost by fire.

3. The plaintiff was interested in the said cargo at all the times mentioned in this claim.

The plaintiff claims £200.

Defence.

1. The plaintiff was not interested in the said cargo at the time of the loss.

2. The said ship was unseaworthy at the commencement of the voyage.

3. The defendant further says that after the commencement of the said voyage and before the alleged loss the said ship deviated from the said voyage.

4. The defendant denies that the said cargo was lost by fire as alleged.

Reply.

1. The plaintiff joins issue upon the defence.

2. As to the 3rd paragraph thereof he says further that if the said ship did deviate from the said voyage she did so in order to succour a vessel which was in distress and to save life and not otherwise.

Rejoinder.

The defendant joins issue on the reply.

8. Claim for Loss of Cargo by "Restraint of kings, &c.," and alternatively for a Return of Premium.

1. On the 2nd of May, 1880, the plaintiff effected with the defendant a policy of marine insurance upon a cargo of barley valued at £3,500 to be shipped on board the "A.," and the defendant insured the same against loss by any of the ordinary perils, including "arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever," at and from O. to B. to the extent of £300, at a premium of £12.

2. The said cargo of barley was shipped on board the "A.," and during the said voyage the said cargo was forcibly taken out of the possession of the plaintiff by the Russian Government and the same has become wholly lost to the plaintiff.

3. The plaintiff was interested in the said cargo to the amount insured at the time of the insurance and of the loss

The plaintiff claims:—

(1.) £300; or

(2.) In the event of the plaintiff not being entitled to recover on the said policy, a return of the premium paid and interest.

Defence.

1. The defendant says that the said cargo was warranted by the plaintiff as free from capture and seizure of kings, princes.

2. The said cargo was captured and seized by the Russian Government within the true intent and meaning of the said warranty and was not lost to the plaintiff by any of the perils insured against.

9. Claim on a Policy for Damage to Cargo insured.

1. On the 7th October, 1876, the plaintiff effected with the defendant a policy of marine insurance upon 360 casks of olive oil, the property of the plaintiff, valued at £8,000, to be carried by the ship "B.S." from G. to L., and the defendant subscribed the said policy for £1,800.

2. During the said voyage, and while the plaintiff's interest

in the said casks of oil continued, divers of the said casks were by the perils insured against greatly damaged and a quantity of the said oil was lost.

Particulars of damage :—

Ten casks of olive oil wholly lost at £15 a cask, £150.

The plaintiff claims £150.

Defence.

1. The defendant does not admit that the said casks were damaged and the said oil lost by any of the perils insured against.

2. The said oil was shipped in improper and insufficient casks, and the loss was caused by the improper and insufficient state and inherent vice of the said casks.

3. The value of a cask of the said oil is not £15 or more than £7.

10. Claim by Ship-owner on Policy for Loss of Freight.

1. On the 17th of June, 1878, Messrs. J. and W. S. chartered the plaintiffs' ship the "S." to load a complete cargo of rice and convey it from A. to B. at an agreed freight of £2,000.

2. On the 25th of June, 1878, the plaintiffs effected a policy of marine insurance with the defendant upon their interest in the said freight, and the defendant subscribed the said policy for £100 and insured the same against the ordinary perils, including the perils of the seas.

3. During the voyage from A. to B. and while the plaintiff's interest in the said freight continued, the said ship the "S." and her cargo of rice were wholly lost by the perils insured against, and the plaintiffs wholly lost the freight they would otherwise have earned.

The plaintiffs claim £100.

11. Claim by Assignee of a Policy for Particular Average Loss and Expenses under Swing and Labouring Clauses.

1. On the 3rd of September, 1880, Messrs. G. & F., of L., as owners, insured with the defendant by a policy of marine in-

insurance of that date 18,460 dollars in gold and 3,900 quarters of mixed maize in bulk, free of particular average unless caused by burning, stranding, sinking, or collision, to be shipped on board the "P." at and from Y. to Z., and the defendant subscribed the said policy for the sum of £200. The policy contained the ordinary suing and labouring clause.

2. Messrs. G. and F. afterwards sold the subject-matter of insurance to the plaintiff and assigned the said policy to him, and the plaintiff continued to possess the beneficial interest therein up to and including the time of the losses hereinafter mentioned.

3. While the "P." was on the said voyage she was stranded near C. by perils insured against, viz., the perils of the seas, and a particular average loss amounting to £200 under the said policy was caused by the said stranding.

4. Afterwards and during the said voyage a loss occurred within the meaning of the policy, and the plaintiff in suing and labouring in the defence of the subject-matter of insurance incurred expenses to the amount of £70.

Particulars of the said expenses, exceeding three folios in length, accompany.

The plaintiff claims £270.

Insurance—II. Life Policies (a).

1. *Claim by Administrator of Assured upon a Life Policy.*

1. The plaintiff is the administrator of the personal effects of A. B., deceased.

2. The said A. B., on the 13th of May, 1878, effected a

(a) A contract of life insurance differs from a contract of marine insurance in this, that it is not a contract of indemnity merely like the latter, but an undertaking by the insurers to pay a sum certain upon the death of a given life. It is necessary, however, that the insurer should have an interest in the life insured, at the time of entering into the insurance (see the 14 Geo. 3, c. 48, ss. 1, 2, by which it is also provided that the name of the person interested, or for whose use or benefit or on whose account the policy is made, shall be inserted in it), though it is not necessary that this interest should continue till the death of the person insured. (See *Dalby v. India, &c., Life Assurance Co.*, 15 C. B. 365; L. J. 24 C. P. 2; and 2 Smith's Leading Cases, 7th ed., 260, and notes thereto.)

As to what constitutes an insurable interest, it has been held that a pecuniary interest is meant, and therefore an insurance by a father in

Life insurance more than a contract of indemnity.

Insurer must have pecuniary interest at the time of contract.

policy of life insurance with the defendant company for the sum of £1000, and the defendant company agreed to pay to

What
amount
to an
insurable
interest.

his own name on the life of his son, he having no pecuniary interest in it, is void. (*Halford v. Kymer*, 10 B. & C. 724; *Worthington v. Curtis*, 45 L. J. Ch. 259; 1 Ch. D. 419.) But everyone has an interest in his own life, and if he insures it his executor is not bound to show any interest beyond this (*Wainwright v. Bland*, 1 M. & Rob. 481); so a wife may insure her husband's life (*Reed v. Royal Exchange Assurance Co.*, Peake Add. Ca. 70); and now by the 45 & 46 Vict. c. 75, s. 11, a married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof shall enure to her accordingly. So a creditor may insure his debtor's life. (*Anderson v. Edir*, Park Ins. 8th ed. 914.) As in the case of marine policies so in the case of life policies, the assured can only recover the amount of his insurable interest in the life of the person insured; and if he chances to have it covered by several policies, he can only recover the amount on one or more policies. (*Hebdon v. West*, 3 B. & S. 579; L. J. 32 Q. B. 85.)

Assign-
ment of life
policies.

Life policies may be assigned, and by the 30 & 31 Vict. c. 144, the assignee may sue in his own name upon giving written notice of such assignment to the assurance company liable under the policy. A written agreement by the owner of a life policy to execute an assignment of it is not an assignment within the Act, and notice of such an assignment to the insurance office does not give priority over the prior equitable title of a person who had not given notice. (*Spencer v. Clarke*, 9 Ch. D. 137; 47 L. J. Ch. 692.)

Where an equitable mortgagee of a policy of life insurance sues the company for the policy monies, the Court of Appeal intimated in *Webster v. The British Empire Mutual Life Assurance Co.*, 49 L. J. Ch. 769; 15 Ch. D. 169 (dissenting from *Crossley v. The City of Glasgow Co.*, 4 Ch. D. 421; 46 L. J. Ch. 65), that the presence on the record of the personal representatives of the assured ought not to be dispensed with.

An assignee of a life policy need not show any interest in the life of the person insured, other than the original interest of his assignor at the time of the entering into the policy. (*Ashley v. Ashley*, 3 Sim. 149.)

The effect
of false
or fraudu-
lent misre-
presenta-
tion by the
assured.

The assured usually subscribes a declaration answering facts inquired of by the insurers, and it is made a condition that if any be untruly answered, the policy is to be void. In such a case the policy is void though there is no intentional untruth (*Macdonald v. Law, &c., Insurance Co.*, L. R. 9 Q. B. 328; *The London Assurance Co. v. Mansel*, 11 Ch. D. 363; 48 L. J. Ch. 331); and it makes no matter though the misstatement is found by the jury to be immaterial, for as the basis of the contract is the truth of the representation, its materiality is not in question, and ought not to be left to the jury. (*Anderson v. Fitzgerald*, 4 H. L. C. 484; *Cazenove v. British Equitable Assurance Co.*, 6 C. B. N. S. 437; L. J. 28 C. P. 259.) But mere representations and statements which turn out untrue will not avoid a life policy, unless the policy purport to be based upon their truth, or there be fraud. (*Wheelton v. Hardisty*, 8 E. & B. 232; L. J. 26 Q. B. 265.)

When the
assured
commits
suicide.

There is generally a clause in life policies avoiding the policy if the person whose life is insured "commits suicide," or "dies by his own hand;" and this clause has been construed to include all voluntary self-destruction, though not felonious. Therefore, where, as often happens, a man whose life is insured (there being a clause of the kind in the policy), commits suicide in a fit of insanity, his representatives, or those who hold the policy, cannot recover on it. (*Clift v. Schwabe*, 3 C. B. 437; *Dormay v. Barrodaile*, 5 C. B. 380; but see *Smith's Mercantile Law*, 9th ed. 404—5.)

his executors, administrators, or assigns, the said sum of £1000 within three months of the death of the said A. B., and notice to the defendant's company thereof.

3. A. B., during the continuance of the said policy, and more than three months ago, died, and the defendant's company have had three months' notice of his death.

The plaintiff claims £1000.

Defence.

1. It was an express condition of the said policy of insurance that the defendant company should not be liable to pay the said sum of £1000, or any part thereof, to the executors, administrators or assigns of the said A. B., if he should commit suicide, or die by his own hand.

2. The said A. B. did commit suicide, and died by his own hands.

Reply.

The plaintiff joins issue upon the statement of defence.

2. Claim by a Creditor upon a Policy of Insurance on the Life of his Debtor.

1. On the 5th of May, 1860, the plaintiff was the creditor of C. D., of F., for more than £500.

2. On the said 5th of May, 1860, the plaintiff insured the

Where a policy of insurance against death contained a proviso that the insured should not be entitled to make any claim for any injury from any accident, unless such injury should be caused by some outward and visible means of which proof could be furnished, and that "this insurance shall not extend to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease;" and the insured was seized with an epileptic fit whilst crossing a shallow stream, and fell down in the water and was drowned, it was held by the Court of Appeal that the circumstances of the insured's death were not such as to relieve the insurance company from liability. (*Winspear v. Accident Ins. Co.*, 50 L. J. Ex. 292.) And so where in the policy there was a proviso excepting the liability of the insurance company when the death was caused by any "fit," &c., and the insured was seized with an epileptic fit, and falling down was killed by an engine passing over him, it was held that the company was still liable to pay the amount insured. (*Lawrence v. The Accident Insurance Co.*, 50 L. J. Q. B. 522.)

A policy of assurance does not bear interest, and a plaintiff can only recover it where the jury give it in the nature of damages for any improper delay on the part of the company in settling the claim. (*Webster v. The British Empire Mutual Co.*, quoted *supra*.)

life of the said C. D. with the defendants, and the defendants agreed to pay to the plaintiff the sum of £500 upon the death of the said C. D., if the said policy was then subsisting, together with all bonuses which might accrue upon the said policy.

3. The said C. D. died on the 15th of June, 1880, during the continued subsistence of the said policy.

The plaintiff claims :—

- (1) £500, and
- (2) £400 for bonuses accrued due on the said policy.

Defence.

1. The defendants say that it was a term of the said contract of assurance that the said C. D. should truthfully answer certain questions then submitted to him in writing by the defendants, and that, if the said answers were in any particular inaccurate, the said policy should be deemed to be void.

2. The said C. D. did not truthfully answer all the said questions, but, on the contrary, falsely stated that he had never applied to any other insurance company for a policy of insurance, whereas, in fact, he had previously applied to the Globe Insurance Company.

3. Claim by Assignee of a Life Policy.

1. By a policy of life insurance dated the 10th of August, 1880, the defendants agreed with M. O., of T., that they would pay to his executors, administrators or assigns, the sum of £1000 within three months of due notice received by them of his death.

2. On the 1st of September, 1880, the said M. O. assigned the said policy of insurance to the plaintiff, who forthwith gave notice in writing of such assignment to the defendants.

3. M. O. died on the 3rd of October, 1880, and the defendants have had three months' notice of his death.

The plaintiff claims £1000.

4. Claim by an Equitable Mortgagee of a Life Policy.

1. On the 2nd of March, 1847, the defendants, the "C" Company, by a policy of that date insured the life of Robert

Brown for £500, at a quarterly premium of £5 11s. 3d., and agreed that if the said premiums were duly paid, they would pay to the executors, administrators or assigns of the said Robert Brown, the sum of £500, with all bonuses which might have accrued upon the said sum, within two months of his death.

2. On the 3rd of March, 1847, the said Robert Brown deposited the said policy with the plaintiff as security for a debt of £435.

3. Robert Brown paid the quarterly instalments only down to the 3rd of August, 1848, and from that time to the death of the said Robert Brown, the said instalments were paid by the plaintiff.

4. Robert Brown died insolvent in December, 1874, by his will appointing the defendant, A. B., his executor, and the defendants, the "C" Company, have had two months' notice of his death.

The plaintiff claims :—

- (1) A declaration that the said policy was deposited with him, and remained as a security for the debt of £435, and the sum of £578 10s. paid for premiums ;
- (2) That the defendants, the "C" Company, be directed to pay over to him the said sum of £500, and £360 bonuses.

Insurance—III. Fire Policies (a).

1. *Claim on a Fire Policy.*

1. On the 13th of May, 1880, the plaintiff effected with the defendant a policy of insurance against loss or damage from

(a) A fire policy is, like a marine policy, a contract of indemnity, and the assured can only recover the actual loss or damage sustained according to the quality and value of the goods at the time of the fire. (*Chapman v. Pole*, 22 L. T. N. S. 306 ; *Castellain v. Preston*, 11 Q. B. Div. 380 ; 49 L. T. 29) ; and it is necessary to show an interest in the subject insured, at the time both of insuring and of the fire. (*Lynch v. Dalzell*, 4 Bro. P. C. 431 ; *Saddlers' Co. v. Badcock*, 2 Atk. 554.) Warehousemen and wharfingers may insure their customers' goods in their custody. (*Waters v. Monarch Assurance Co.*, 5 E. & B. 870 ; L. J. 25 Q. B. 102.) A carrier may insure the goods in his custody, and he may recover the whole value of the goods lost by fire, although the owner of the goods may be disabled from recovering from the carrier by reason of the value

Fire policy
a contract
of indemn-
nity.

fire upon the household furniture in the plaintiff's house, No. 16, Gaiford Terrace, Chelsea, for the sum of £500, and from the said 18th of May, 1880, until the 18th of May, 1881.

The insurable interest.

not being declared under the Carriers' Act. (*London & North-Western Railway Co. v. Glyn*, 1 E. & E. 652; L. J. 28 Q. B. 188; *Ebsworth v. Alliance Marine Insurance Co.*, L. R. 8 C. P. 596.) But anything the carrier recovers over and above his own beneficial interest he holds in trust for the owners (*ibid.*). A person who has a limited interest in the subject-matter of insurance, as a tenant for life, or remainderman, or a mortgagee, can if he likes insure for the full value of the thing in question, but if he intended merely to cover his own interest he can only recover the amount of it. On the other hand, if he intended to cover the other persons interested, he may recover the whole value from the insurance office, but he holds the surplus in trust for the persons beneficially interested. (*Per Bowen, L.J.*, in *Castellain v. Preston*, *supra*.) This results from the principle which was laid down in the last case in its most inflexible form, that a contract of fire insurance can never be anything more than an indemnity.

Effect of alteration of property.

As to loss by negligence of insured.

The property intended to be insured must be described in the policy, and there is generally a condition against any alteration in the premises after the making of the policy; and when this is the case any material alteration will avoid the policy. But where there is no condition of the kind a subsequent change, as by setting up a more hazardous trade in them, if without fraud, will not destroy the policy. (*Pim v. Reid*, 6 M. & Gr. 1.) The policy covers a loss by fire owing to the negligence of the assured himself, if there be no fraud. (*Shaw v. Robberds*, 6 Ad. & E. 75.)

In *Collingridge v. Royal Exchange Assurance Co.*, 3 Q. B. D. 173, it was held that though at the time of the loss the assured had contracted to sell the property in question, he was still entitled to recover the whole amount insured from the defendants; but where between the date of sale and completion the insured premises were damaged by fire, and the vendor received the insurance money from the company, it was held that upon the completion of the purchase and the receipt by him of the whole amount of the purchase money, the insurance company were entitled to recover back again the insurance money they had paid. (*Castellain v. Preston* (C. A.), *supra*.)

The insured entitled to all the rights of the assured.

It was laid down clearly in the case of *Darrell v. Tibbets*, 5 Q. B. Div. 560, following *North British Ry. Co. v. London, Liverpool, & Globe Insurance Co.*, 5 Ch. Div. 569, that a policy of fire insurance being only a contract of indemnity upon payment of the amount insured, the insurer is entitled to be put in the place of the assured; and if at a subsequent time the assured receives compensation from other sources for the loss sustained, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually suffered by him. (*Castellain v. Preston* is in full accordance with this principle.)

A house insured by the vendor was, after the date of the contract for sale, but before completion partly burnt down, and the vendor received the insurance money. In these circumstances it was held by majority of the Court of Appeal that the purchaser as against the vendor could not recover the insurance moneys either as an abatement of his purchase money or for the reinstatement of the premises. (*Rayner v. Preston*, 50 L. J. Ch. 472.)

Unlike life and marine policies, a fire policy is not assignable under any statute; but in equity even a fire policy may be assigned so as to give the assignee the right to sue upon it in his own name (*per Brett, L.J.*, in *Rayner v. Preston*, *supra*); and where by agreement between the parties the beneficial interest in a property has passed from the

2. On the 15th of September, 1880, the said household furniture was wholly destroyed by fire.

The plaintiff claims £500.

Defence.

1. The defendant does not admit that any part of the said household furniture was destroyed by fire.

2. The plaintiff, with the intention of defrauding the defendant, wilfully set fire to his said premises, and any loss or damage which happened to the said furniture was by reason of the said wilful and fraudulent act of the plaintiff.

2. Another Claim upon a Fire Policy.

1. On the 1st of February, 1880, the defendant insured the plaintiff's mill at Blackburn against loss or damage from fire for the sum of £5000, and the stock-in-trade therein for the further sum of £3500, and he agreed that in the event of any loss or damage happening to the said subject-matter of insurance by the peril insured against on or before the 1st of February, 1881, that he would make good the same to the plaintiff to the amount insured.

2. On the 13th of January, 1881, the plaintiff's said mill was partially destroyed by fire and his stock-in-trade was much damaged by fire.

Full particulars, exceeding three folios in length, of the damage done are delivered herewith.

The plaintiff claims :—

- (1) £4000 in respect of the injury to the mill; and
- (2) £2000 in respect of the injury to the stock-in-trade.

Defence.

1. It was a term of the said contract of insurance that if the plaintiff should begin to carry on any dangerous business upon the insured premises during the continuance of the policy

insured to another, and there is an *express agreement* that the rights under the policy shall also pass, anything which the insured might recover (provided he had sufficient interest left to sue) he would hold as trustee for the other.

the same should at once become void, and the defendant should not be further liable under it.

2. In the month of November, 1880, the plaintiff commenced the manufacture of gunpowder upon the said premises, which was a dangerous business within the meaning of the policy.

3. In the alternative the defendant brings into court the sum of £1000, and says that the same is sufficient to satisfy the plaintiff's claim herein.

Reply.

The plaintiff joins issue upon the statement of defence.

*3. Claim by Insurance Company to Recover back Insurance
Monies paid by them.*

1. The plaintiff is the chairman and public officer of the "G." insurance office.

2. On the 10th of May, 1879, the defendant effected a policy of insurance against loss or damage by fire with the plaintiff's company upon a house and workshop in Suffolk Street, Liverpool, for the sum of £1000.

3. On the 7th of November, 1879, and during the subsistence of the said policy, a loss or damage by fire occurred upon the said premises, and the plaintiff's company paid to the defendant the sum of £330 under the said policy in respect thereof.

4. Prior to the said 7th of November, 1879, the defendant had contracted to sell the said insured premises to one A. B. for £3000.

5. Subsequently to the said 7th of November, and after the receipt by the defendant of the said sum of £330, the said contract of sale was completed, and the defendant received the full stipulated price of £3000.

The plaintiff claims £330.

Insurance—IV. Policy against Accidents.*Claim upon a Policy of Insurance against Personal Injuries caused by Accident.*

1. On the 1st of June, 1880, the defendants, in consideration of a sum then paid to them, agreed with the plaintiff that if the plaintiff was injured by any railway accident while on a journey from London to Liverpool that day they would pay to him the sum of £6 a week for every week that he was incapacitated by such accident from following his ordinary business.

2. While on the said journey the plaintiff was seriously injured by a railway accident, and he has been unable for ten weeks to follow his ordinary business and is still unable.

The plaintiff claims £60.

Defence.

1. The defendants deny that the plaintiff sustained any injury while upon the said journey.

2. The plaintiff has not been unable for the last ten weeks or at all to follow his ordinary business nor is he now unable to do so.

Intoxication (a).*Defence of Intoxication to a Claim for Breach of Contract.*

At the time of making the alleged contract the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff then well knew.

Reply.

After the defendant became sober and was able to transact business he ratified and confirmed the said contract.

(a) The law is now well settled that the contract of a drunken man is *voidable* merely, not void, and though if at the time he entered into it the other party knew he was intoxicated, it cannot be enforced against him, yet if after he becomes sober he ratifies or adopts it, he is bound. This is the effect of the decision in *Matthews v. Baxter*, L. R. 8 Ex. 132; and see also Pollock on Contracts, 3rd ed., p. 104.

Issue—Feigned Issue (a).*Feigned Issue under 8 & 9 Vict. c. 118, s. 56.*

Whereas in and prior to the month of October, 1879, proceedings were being, and still are being had and taken under the General Inclosure Act 8 & 9 Vict. c. 118, for the inclosure of certain commons and waste grounds called E. Common, being situate in the lordship of E., in the Manor of B., in the county of W. And whereas the plaintiff was and is owner of a certain farm, lands, and premises called or known as S., in the township or lordship of B., in the said manor of B., and in the parish of B. And whereas on or about the 4th day of October, 1879, the plaintiff duly made his claim in writing bearing that date, and addressed to the valuer acting in the matter of the said inclosure of the said commons and waste grounds called E., whereby the plaintiff claimed in effect a right of common upon the said commons and waste grounds for and in respect or right of the said farm and lands called S., described in a schedule to the said claim. And the plaintiff further claimed such common right and interest on the said commons and waste grounds in respect of the said farm lands and premises belonging to him and described in the said schedule, by reason

(a) Upon the inclosure of commons parties dissatisfied with the decision of the commissioners appointed under the Act to determine their rights can appeal, by means of a feigned issue, to the next assizes. The Inclosure Act of 1845 (the 8 & 9 Vict. c. 118) provides that upon the inclosure of any common all persons who claim allotments shall within a specified time give notice in writing of their claims to the valuer appointed. By sect. 48 the valuer in the first instance adjudicates upon the claims, subject to an appeal to an assistant commissioner. The assistant commissioner in the case of an appeal re-hears the whole matter generally at a place of meeting near the *locus in quo*, and the parties are entitled to be heard by their counsel or solicitor. There is a still further appeal by sect. 56 if any person is dissatisfied with the decision of the commissioner. In such a case, if the party dissatisfied causes notice of his dissatisfaction to be given in writing within thirty days, he may bring an action upon a feigned issue against the person in whose favour a determination has been made, or against the commissioners, and proceed to a trial at the next assizes. The proceedings are similar to those in an ordinary action. A writ is issued and served upon the persons against whom the action is brought; the feigned issue is settled, in the event of disagreement, by a master or judge at chambers; and the case is in due course heard and disposed of at the assizes.

The form given above was used in a number of cases recently tried at the Westmoreland Assizes.

that such common right and interest had been actually enjoyed by the plaintiff and his predecessors, owners or occupiers for the time being of the said last-mentioned lands and premises, claiming right thereto without interruption for the full periods mentioned in and required by the Act of Parliament made and passed in the 2nd and 3rd years of the reign of his late Majesty King William the 4th, intituled an Act for shortening the time of prescription in certain cases, and also from time whereof the memory of man runs not to the contrary. And whereas on or about the 20th day of November, 1879, the defendants by writing signed by them, and bearing that date, gave notice to the plaintiff that they being owners of land in the township of E., in the parish of B., in the county of W., and residing in the said township, thereby objected to the claim made by the plaintiff to a right of common on the commons and waste grounds called E., in the said county. And whereas on or about the 8th, 9th and 10th days of January, 1880, the valuer acting in the matter of the said inclosure heard evidence adduced by the plaintiff in support of his said claim and evidence adduced by the defendants in support of their said objection, and on or about the 24th day of November, 1880, the said valuer duly, and in accordance with the said General Inclosure Act, deposited a schedule of the claims and objections, and of his determination thereon, and by the said schedule he disallowed the claim of the plaintiff. And whereas the plaintiff being dissatisfied with the said determination, on or about the 20th day of December, 1880, being within 30 days after notice to the plaintiff by the said valuer of such deposit as aforesaid, duly gave notice in writing to the Inclosure Commissioners for England and Wales, of his dissatisfaction with the determination of the said valuer upon the claim made by him, and that he desired to have the claim so determined by the valuer heard and determined by the said Commissioners, or by an Assistant-Commissioner, pursuant to the Act in that behalf. And whereas on or about the 23rd November, 1881, the said Inclosure Commissioners for England and Wales gave notice to the plaintiff that a meeting would be held on the 13th of December, 1881, for the purpose of hearing and determining the claim of the plaintiff so desired to be reheard as aforesaid, by G. P. L., Esq., barrister-at-law, an Assistant Inclosure Commissioner specially

appointed for that purpose. And whereas on the said 13th day of December, 1881, the said Assistant-Commissioner reheard the said claim. And whereas on or about the 17th day of December, 1881, notice was duly given to the plaintiff that the said Commissioner had determined and decided that the said decision and determination of the valuer disallowing the claim of the plaintiff should be affirmed. And whereas the plaintiff being dissatisfied with the determination of the said Assistant-Commissioner, on or about the 10th day of January, 1882, and within 30 days after such last-mentioned notice being given, caused due notice in writing of his dissatisfaction to be delivered to the said Commissioners of England and Wales. And whereas the right of common claimed by the plaintiff for and in respect of right of his said farm and lands is a right of common for cattle, sheep, and horses, and all other commonable cattle, levant and couchant, on the said farm and lands. And whereas all conditions have been fulfilled necessary to entitle the plaintiff to bring this action upon a feigned issue under the statute 8 & 9 Vict. c. 118, s. 56, against the defendants, being the persons in whose favour such determination was made. Now the plaintiff affirms, and the defendants deny, that the plaintiff is entitled to the right of common claimed by him as aforesaid, and that the said decision of the said Assistant-Commissioner affirming the said decision of the valuer is erroneous. Wherefore let a jury come, &c.

Issue—Interpleader (a).

Interpleader Issue on Claim to Goods seized by Sheriff.

The 8th day of December, 1883.

London, } E. C. affirms and S. M. and C. M. deny that certain
to wit. } goods or chattels and effects [*Here give a list of*
them] in and about certain rooms and premises in the occupa-

Procedure
in inter-
pleader.

(a) Issues in interpleader proceedings are now regulated by the Rules of Court, 1883, Order LVII. which see. Relief by way of interpleader may be granted in two cases, namely :—(a) Where the person seeking relief (in this order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is or expects to be

tion of N. G., situate and being at —, in the city of London, seized in execution by the sheriffs of London under a writ of *fiery facias* dated the 28th of November, 1883, and issued out

sued by two or more parties (in this order called the claimants) making adverse claims thereto; (b) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued.

Relief in interpleader.

The applicant must satisfy the Court or a judge, by affidavit or otherwise—(a) That the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; (b) That the applicant does not collude with any of the claimants; and (c) That the applicant is willing to pay or transfer the subject-matter into Court, or to dispose of it as the Court or a judge may direct. The applicant is not to be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another.

The sheriff should apply as soon as he has notice of the adverse claim, and he should be careful to get his order marked "no action," otherwise he may be sued in trespass by the claimant. If the applicant is a defendant he should take out an interpleader summons as soon as possible, but he may apply at any time after service of the writ.

If the claimants appear in pursuance of the summons, the Court or a judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff and which defendant. The Court or a judge may, with the consent of both claimants, or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just.

Method of trial.

Where the question is a question of law, and the facts are not in dispute, the Court or a judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court.

If a claimant, having been duly served with a summons calling on him to appear and maintain or relinquish his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the Court or judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves.

Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a judge in a summary way is to be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the Court or judge, as the case may be, or of the Court of Appeal.

When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or a judge may order the sale of the whole or a part thereof, and direct the

of the Queen's Bench Division of the High Court of Justice, directed to the said sheriffs for the having of execution of a judgment of that Court, recovered by the said S. M. and C. M. in an action at their suit against the said N. G., were, or some part thereof was, at the time of the said seizure the property of the said E. C. as against the said S. M. and C. M. And it has been ordered by the Honourable Mr. Justice Smith, pursuant to the statutes in that behalf, that the truth of the matters aforesaid shall be tried by a jury, and that the said matter should be tried at London.

Therefore let a jury come, &c.

Interpleader Issue on Adverse Claims to the same Property.

The 28th day of December, 1883.

Middlesex } R. B. F. affirms, and The P. S. and A. Company,
to wit. } Limited, deny that the said R. B. F. is entitled as
against the said P. S. and A. Company, Limited, to certain
goods, viz., 6000 iron bars, which were delivered by the said
company to the L. and N. W. Railway Co. for conveyance from
their station at W., in the county of S., to their P. Station, in
the county of M., to be delivered to the order of one H. L., No.
95, H. Street, London. And it has been ordered by the

application of the proceeds of the sale in such manner and upon such terms as may be just.

R. S. C. Orders XXXI. and XXXVI. on discovery and the mode of trial, apply to an interpleader issue, and the Court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for.

From anything that may occur in the trial of an interpleader issue there is an appeal from the judgment of the judge who tries the issue, either with or without a jury, but where a judge at chambers who hears the interpleader summons does not order an issue, but decides the matter in the exercise of his summary jurisdiction, or refers the matter to the Court, there is no appeal (*Turner v. Bridgett*, 9 Q. B. D. 55); even although the judge, with the consent of the parties, should purport to give leave to appeal. (*Dodds v. Shepherd*, 1 Ex. Div. 75.) But any order made by the chief judge in Bankruptcy may be appealed from. (*Ex parte Streeter*, 19 Ch. Div. 216.)

Where a litigant who resides abroad is for mere convenience made plaintiff in an interpleader issue, but does not substantially occupy the position of the plaintiff commencing an action, he will not be ordered to give security for costs. (*Belmonte v. Aynard*, 4 C. P. Div. 221, 352.) An applicant in interpleader can have no relief unless he is in possession of the property in dispute, for he must be ready to bring it into Court. (*Allen v. Gilbey*, 3 Dowl. 143.)

Honourable Mr. Justice Field, pursuant to the statutes in that behalf, that the truth of the matters aforesaid shall be tried by a jury, and that the said matters shall be tried in Middlesex.

Therefore let a jury come, &c.

Issue on adverse Claims to Money in Court.

A. B. affirms, and E. F. denies that the said A. B. is entitled as against the said C. D. to the sum of £2000 (the proceeds of 189 £10 fully paid up shares in the X. Y. Z. Co., Limited) paid into Court by C. D. by an order of the Court dated, &c., and made by Master Francis in an action entitled "A. B. and C. D., 1883, A. No. 51," or to some part of the said sum of £2000.

And it has been ordered by the Honourable Mr. Baron Huddleston that the truth of the matters aforesaid shall be tried by a jury in Middlesex.

Therefore let a jury come, &c.

Judgments (a).

Action on a Personal Judgment obtained in France.

The plaintiff's claim is for £200, the amount of a judgment recovered by him on the — of —, 1880, in the Court

(a) A judgment *in rem* by a court of competent jurisdiction is conclusive upon the whole world. Such a judgment is a binding adjudication upon the *status* of the thing adjudicated upon. A judgment *in personam* by a court of competent jurisdiction is equally conclusive as between the parties and their privies in blood, law, and estate.

The party relying upon a judgment should plead it. There is some authority for saying that otherwise the matter might be set at large. (*Magraith v. Hardy*, 4 Bing. N. C. 782.)

Before the Judicature Acts came into force, actions on judgments of a Court of record must have been brought in the county where the Court in which the record was enrolled was situate, the reason being that the venue was local. See now, however, Order XXXVI. r. 1, which abolishes the old rule as to local venue, and *ante*, p. 96.

An action lies on the judgment of an inferior Court other than a County Court. (*Berkeley v. Elderkin*, 22 L. J. Q. B. 281.) "*Prima facie*, an action will lie on the judgment of any court of competent

On what judgments &c., an

of —, in the Republic of France, according to the law of France, and for the costs of the said suit, and interest upon the said sum of £200.

action will lie.

jurisdiction." (*Ibid.* Per Lord Campbell, C. J.) An action did not in general lie on the decree of a Court of equity. As under the Judicature Acts there are now no separate superior Courts, but only divisions of the High Court, that doctrine will no longer be held to apply. An action lies on the decree of a colonial Court of equity. (*Henderson v. Henderson*, 6 Q. B. 288.) No action lies on a Judge's order or rule of Court. (*Hookpayton v. Buswell*, 10 Ex. 24; *Sheehy v. Professional Life Assur. Co.*, 26 L. J. C. P. 301.) But an action will lie on an agreement, though an order is superadded. (*Lieccesley v. Gilmore*, L. R. 1 C. P. 570; 35 L. J. C. P. 351.)

In the case of judgments recovered in a foreign or colonial Court, the plaintiff may sue either on the judgment or the original cause of action. *Hall v. Oäber*, 11 East, 118. And see per Tindal, C. J., in *Smith v. Nicholls*, 5 Bing. N. C. 208, 221; *Bank of Australasia v. Harding* 9 C. B. 661.)

A statement of claim in an action on the judgment of a foreign Court need not state that the Court had jurisdiction over the parties or the cause, as every presumption is made in favour of foreign judgments. (*Robertson v. Struth*, 5 Q. B. 941; *Henderson v. Henderson*, 6 Q. B. 288.)

As to the mode of proving foreign and colonial judgments, see 14 & 15 Vict. c. 99. s. 7.

Plaintiff suing on a judgment not entitled to costs without order of the Court.

The 43 Geo. 3, c. 46, s. 4. provides that in actions on judgments recovered in any Court in England or Ireland the plaintiff shall not recover or be entitled to any costs, unless the Court or judge thereof shall otherwise order. Such an order will not, as a rule, be made where the plaintiff could have realized the amount of his judgment by execution. (*Chitty's Precedents*, 18 ed., 493.) The above provision does not apply to an action on a judgment and also on a distinct cause of action; and in such a case, if the plaintiff succeeds, he does not require an order for his costs under this statute. (*Jackson v. Everett*, 31 L. J. Q. B. 59.)

Defences.

Defence that the judgment sued on does not exist.

The following are the most usual defences in actions on judgments:—

A denial of the fact of the judgment.—This under the system prior to the Judicature Act was called a defence of *non tiel record*, and it amounted to an assertion by the defendant that there was no such judgment as that set forth. If there is a judgment but its effect is misdescribed in the statement of claim, it would not be wise to rest on a simple denial of its existence; but the defendant should deny the allegation in the statement of claim, except so far as related to the recovery of a judgment by the plaintiff against the defendant, and then state that its effect was wrongly described, and in what respect.

Of payment.

Payment.—By the 4 & 5 Anne, c. 16, s. 12. "Where any action of debt shall be brought upon any judgment, if the defendant has paid the money due thereon, such payment may be pleaded in bar of the action." Such a defence could not have been set up before the statute, as the payment was a matter *in pais*, which could not be pleaded to matter of record. Of course such a defence is now available, only the mode of stating it has been modified. The statement of defence should simply state the fact of payment, giving as nearly as may be the date.

Of release.

Release.—This defence could be pleaded in bar before the passing of the Judicature Acts. (*Barker v. St. Quintin*, 12 M. & W. 441.) The

Particulars :—

1880. Due on the judgment	£200	0	0
Interest thereon at — per cent			
for — years	30	0	0
Taxed Costs	51	0	0

The plaintiff claims £281 and interest until judgment.

date, &c., of the release should be set forth in the statement of defence. A debt of record can only be released by deed.

Discharge.]—One defence formerly available on this ground, viz., the arrest of the defendant under a *ca. sa.*, is no longer open to him, imprisonment for debt being now abolished except under certain circumstances.

Where a person is imprisoned for a debt in any of the cases in which he is still liable to arrest, the debt is not discharged.

There can be no defence of accord and satisfaction to this action. (1 Chitty's Pleadings, 9th ed., 464.)

Matter impeaching validity of judgment.]—The defendant is not at liberty to plead any facts which might have been set up as a defence in the original action (1 Chitty, 7th ed., 512.) Neither can facts which may afford ground for an application to set aside the judgment be raised by way of defence in an action on the judgment. But a matter which would be a ground for an absolute and unconditional injunction against the continuance of this action, and which even formerly might have been set up as an equitable defence, may be set up as a defence; or the defendant may claim an injunction on the strength of it in his statement of defence.

The judgment sued on cannot be impeached on the merits.

Whether the former requirement, viz., that the facts must be such as to be ground for an *absolute and unconditional* injunction, would now be necessary for the purpose of a defence, is not easy to determine. This would not apparently be necessary to found a claim to an injunction, as by the 25 section, sub-section 8, of the Judicature Act of 1873, injunctions may be granted, either conditionally or unconditionally, by all the divisions of the High Court.

A matter which is the subject of error cannot be set up as a defence to an action on the judgment. (*Dick v. Tolhausen*, 4 H. & N. 695.)

The principle already laid down that any matter which could have been set up as a defence on the merits in the original action cannot be pleaded to an action on the judgment, applies to actions on the judgments of foreign Courts. (*Henderson v. Henderson*, 6 Q. B. 288; *De Cosse Bressac v. Rathbone*, 6 H. & N. 301; 30 L. J. Ex. 238; *Munroe v. Pilkington*, 31 L. J. Q. B. 81, 89; *Castrique v. Imrie*, L. C. 4. H. L. 414; 29 L. J. C. P. 321; 8 C. B. N. S. 1, 405.)

This rule applies to foreign judgments.

Neither will a defendant be permitted to defend on the ground that the foreign judgment was erroneous in point of law and on the merits; or that fresh evidence had been discovered since the judgment, showing it to be erroneous; or for a mistake in the law of the foreign state in which the judgment was given (*Munroe v. Pilkington*, 31 L. J. Q. B. 86, 89); or that evidence was admitted which would not be admissible by English law. (*De Cosse Bressac v. Rathbone*, *supra*.)

A foreign judgment may, however, be impeached on any of the following grounds, viz.: (1) that the Court had no jurisdiction in respect of the matter of the suit or of the parties (*Ferguson v. Mahon*, 11 A. & E. 179; and see *Robertson v. Struth*, 5 Q. B. 941); (2) for errors on the face of the judgment, and for this purpose the reasons assigned in the judgment form part of it (*Reimers v. Druee*, 26 L. J. Chan. 196; 23

Grounds on which a foreign judgment bad.

Defence.

The defendant says that :

1. The said Court of — was not a Court duly holden or having jurisdiction according to the laws of France over the subject-matter of the said suit.
2. The action was commenced by process and the defendant was not at the time of the commencement thereof or for ten

When a
foreign
judgment
may be
impeached.

Beav. 150) ; (3) perhaps for repudiating English law where it was necessary to decide the case (*Reimers v. Druce*, *supra* ; *Semson v. Fygo*, 29 L. J. C. 657 ; *Munroe v. Pilkington*, 31 L. J. Q. 81. But see *Godard v. Gray*, L. R. 6 Q. B. 139) ; (4) that the judgment was contrary to natural justice (*Buchanan v. Rucker*, 1 Camp. 63) ; (5) that the judgment was not final and conclusive (*Patrick v. Sheddin*, 2 E. & B. 14 ; *Frayes v. Worms*, 10 C. B. N. S. 149 ; *Plummer v. Woodburne*, 4 B. & C. 625) ; (6) that the defendant was not summoned, and had no notice of the proceedings (*Buchanan v. Rucker*, *supra* ; *Reynolds v. Fenton*, 3 C. B. 187.) It was laid down in *Schibby v. Westenholz* (L. R. 6 Q. B. 155) that a judgment of a foreign Court obtained in default of appearance against a defendant, cannot be enforced in an English Court where the defendant, at the time the suit commenced, was not a subject of nor resident in the country in which the judgment was obtained, for there existed nothing imposing on the defendant any duty to obey the judgment, and see *Ronsillon v. Ronsillon* (14 Ch. Div. 351). (7) That the judgment was obtained by fraud. (*Oehsenbein v. Papotier*, L. R. 8 Ch. 695.) This principle has been sanctioned by the Court of Appeal in the very recent case of *Abouloff v. Oppenheim* (10 Q. B. Div. 295) where it was laid down that a foreign judgment obtained by the fraud of a party to the suit in the foreign Court cannot be afterwards enforced by him in an action brought in an English Court, even although the question whether the fraud had been perpetrated was investigated in the foreign Court, and it was there decided that the fraud had not been committed. (6) That the judgment is admitted to have been erroneous (*Meyer v. Ralli*, 1 C. P. D. 358.) Other grounds on which foreign judgments may be controverted will be found stated 2 Smith's L. Cas. 7th ed., 823—825. And see Story's Conflict of Laws, 7th ed., p. 732.

It was held in *Godard v. Gray* (L. R. 6 Q. B. 139), that a defendant cannot set up as an excuse for not paying money awarded by a judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to English law, and that it made no difference that the mistake appeared on the face of the proceedings.

Appeal
pending no
defence.

The fact that an appeal is pending against the judgment cannot be made the ground of a defence to an action thereon, though it can be made the ground for staying execution on the judgment in such action. (*Munroe v. Pilkington*, 31 L. J. Q. B. 81.)

Formerly, if it was desired to have execution on a judgment obtained in England on property in Ireland or Scotland, or conversely, it could not be done without first bringing an action on the judgment in the country in which it was sought to have execution. Now, however, by 31 & 32 Vic. c. 54, the holder of a judgment in one country can have execution on it by registering it in the country in which he wishes to issue execution ; and by the 45 & 46 Vic. c. 31, the judgments of inferior courts in England, Ireland, and Scotland can be registered and enforced in one another.

years previously domiciled within the jurisdiction of the said Court, and the defendant was not at any time before the recovery of the said judgment served with any process in the said action, nor did the defendant appear in the said action, nor had he before the recovery of the judgment any notice or knowledge of any process or of any proceedings in the said action, or any opportunity of defending himself therein.

3. The defendant was not subject to the laws of France at any time during the said action, nor was he then nor is he now under any obligation to submit to the jurisdiction of the said Court of —.

Action of Detinue based on a Foreign Judgment In Rem.

1. By a judgment dated the 14th of November, 18—, of the Supreme Court of the United States, a court having jurisdiction in that behalf, the steam-ship "Alfrida" was condemned as the plaintiffs' lawful prize and adjudged to be and it is the property of the plaintiffs.

2. The defendant detained and detains from the plaintiffs the plaintiffs' said ship which is now lying at Kingston-on-Hull.

The plaintiffs claim a return of the said ship or her value and £10,000 for her detention.

Landlord and Tenant (a).

Statement of Claim for Rent.

The plaintiff's claim is for £65, being one quarter's rent for the quarter ending Ladyday, 1883, of the house and premises

(a) The relation of landlord and tenant is constituted either by deed, writing, or parol agreement, accompanied or followed in each case by delivery of possession. In two cases, viz., tenancy at will and tenancy by sufferance, it may arise apart from any express agreement.

Leases for a term not exceeding three years from the making thereof, whereupon the rent reserved during such term shall amount to two-thirds of the full improved value of the thing demised, may be either by agreement in writing simply or by word of mouth (29 Car. 2, c. 3, ss. 1 and 2).

All leases for above that period are required by the statute just mentioned to be in writing, signed by the parties making the same, or their

How relation of landlord and tenant created.

No. 11, High Street, Droitwich, due under an agreement in writing dated April 2, 1882, and made between the plaintiff and the defendant.

When it must be created by deed.

agents authorised by writing, and if they are not so made, they will only create tenancies at will. And now, by the 8 & 9 Vict. c. 106, s. 3, it is provided that leases required by law (*i.e.*, by the Statute of Frauds, 29 Car. 2, c. 3) to be in writing, shall be void *at law*, unless they are made by deed. It has, however, been held that an instrument purporting to be a lease for over three years was good in equity, as an agreement for a lease on which specific performance could be decreed. (*Rollam v. Leon*, 7 H. & N. 73.) Now that the distinctions between the doctrines of law and equity are abolished, and those of the former which were in conflict with the latter are no longer to have any effect in any Court, it follows that such instruments would not be treated as void in the Queen's Bench Division.

Leases of incorporeal hereditaments, such as of tithes, or of the right to shoot over land for even the shortest period, require to be by deed. (*Gardiner v. Williamson*, 2 B. & Ad. 336; *Bird v. Higginson*, 6 A. & E. 824.) But see *Adams v. Clutterbuck* (10 Q. B. D. 403) as to the effect of this.

Where a lease is in two parts, one party executing each part, if there is a material variation between the two parts, it is void for want of mutuality. (*Wynne's Case*, L. R. 8 Ch. 1002.)

The persons who are immediately entitled to bring actions and liable to be sued on the covenants in leases are the lessor and lessee and their assignees.

When covenants "run" with the land.

At common law certain covenants "run" with the land or thing demised, *i.e.*, the burthen and benefit of the covenants pass to the assignees of the leases. These covenants are:—1st. Where the covenant refers to a thing *in esse*, parcel of the thing demised, as to keep a house on the demised premises in repair. The benefit of this covenant passes to the assignee of the lease, even though the word "assigns" be not used in the covenant. 2nd. If the covenant relates to something to be done on the land demised, as to build a wall thereon, it runs to the assignee, if the covenant has been made for the lessee and his assigns. Covenants of this kind did not, however, run with the reversion, *i.e.*, pass to the assignee thereof, until the 32 H. 8, c. 34 provided that such assignees should be entitled to the same rights and subject to the same liabilities on covenants in the lease as their assignors. It has been held that this statute only applied to covenants running with the land. (See *Spencer's case*, 1 Smith's L. C. 7th ed., 60.)

Lessor bound to give possession.

When lessee is not bound to enter.

Liabilities on execution of lease or agreement.—The lessor binds himself to give the party to whom he demises possession, and not a mere right to take possession from a wrongdoer by an action of ejectment, and the lessee binds himself to accept possession and pay the rent. (*Stanley v. Hayes*, 3 Q. B. 105.) If a party agrees to take a house from a particular day, provided certain things are then done by the landlord, and the things are not done, he may decline to take possession. (*Tidey v. Mollott*, 33 L. J. C. P. 235.) A person who has contracted orally for the hire of realty, and who neglects or refuses to accept possession, cannot be sued on such agreement for not taking possession, nor on any oral promise to pay rent, nor for use and occupation. (Addison on Contracts, 7th ed. 555.)

The covenant for quiet enjoyment.

Covenants by lessor.—Quiet enjoyment.—Apart from an express covenant for quiet enjoyment, the use of the word "demise" or "let" in an indenture of lease imports such a covenant. (*Hall v. City of London Brewery*, 31 L. J. Q. B. 257.) But if there be an express covenant

Defence.

The defendant says that :

1. Since April 2, 1882, and before December 25, 1882, the plaintiff had ceased to have any estate or interest in the premises demised.

either as to quiet possession or title, no implication arises from these words. (*Line v. Stephenson*, 5 Bing. N. C. 183; *Adams v. Gibney*, 6 Bing. 656.) The liability on implied covenants ceases with the estate of the lessor, and, where he is a tenant for life, does not attach to his executors. (*Adams v. Gibney*, *supra*.) On a parol demise the law implies a promise of quiet enjoyment, but not for good title. (*Bandy v. Cartwright*, 8 Ex. 913.) There is no implied warranty in a lease of a house or land, that it is reasonably fit for habitation or cultivation. (*Burton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, *ib.* 61.) It is different where there is a contract for letting a house and furniture; and if they are unfit at the commencement of the term the tenant does not obtain that for which he contracted, and may rescind the agreement. (*Wilson v. Finch-Hatton*, 2 Ex. Div. 336; 46 L. J. Exch. 489; 36 L. T. 473; 25 W. R. 537.)

No implied warranty of fitness for habitation, &c.

What constitutes a breach of covenant or promise for quiet enjoyment.—[This being a covenant against disturbance by any person having lawful title, will not be broken by a tortious disturbance by a stranger. (*Dudley v. Fulcott*, 3 T. R. 587.) A covenant for quiet enjoyment against A., "and all persons by his means, title, or procurement," is violated by an entry by A.'s wife, in whose name A. purchased jointly with his own. (*Butler v. Swinerton*, Palm. 339.) An entry on the demised premises and distress for land-tax due from the lessor before the demise is not a breach of the covenant, for that is not by a person claiming through but against him. (*Stanley v. Hayes*, 3 Q. B. 105.) But *seem* if the tenant pays out the distress he may recover the amount against his lessor as money which the lessor was legally compellable to pay, and the tenant has been compelled to pay. An entry by a person claiming through the lessor is not the less a breach because the lessee has instigated it. (*Young v. Raincock*, 7 C. B. 310.) Merely forbidding the tenant's subtenant to pay him rent is not a breach. (*Witchcot v. Linesey*, 1 Broul. 81.) Restraining the tenant by means of legal proceedings not from the possession but from enjoying the premises in a particular manner, as using them as a beer-shop, is not a breach. (*Dennett v. Atherton*, L. R. 7 Q. B. 316, Ex. Ch.) A refusal by a lessor to give or to allow the plaintiff to take possession, cannot be made the ground of an action for breach of covenant or promise for quiet enjoyment. (*Hawkes v. Orton*, 5 Ad. & E. 367.) The proper remedy is specific performance.

What is a breach of covenant for quiet enjoyment.

This action may be brought on the covenant for quiet enjoyment implied from the word demise. (Com. Dig. Cov. (A. 4)). And an action for breach of contract for quiet enjoyment lies on the promise of quiet enjoyment implied from a parol demise. (*Bandy v. Cartwright*, 22 L. J. Ex. 285; *Hall v. City of London Brewery Co.*, 31 L. J. Q. B. 257.)

Measure of damages.—Where the tenant was sued for trespass by another person claiming under the lessor, and gave notice of the action to him (lessor), but the latter took no notice thereof, and the tenant then defended the action, and a verdict was recovered against him, it was held in an action by the tenant against the lessor, that the plaintiff was entitled to recover the amount of the verdict and costs, his own costs in defending the action, compensation for the loss of the land, and also the

Damages recovered by lessee.

in the December of 1882, and A. B. being then the owner of the said premises, lawfully evicted the defendant from the possession of the said premises.

title of a lease may be had generally. *Boydell v. Dumas*, 1 L. R. 3 Ex. 44; 11 L. J. 485. And see *Morris v. Barwell*, 7 Wils., L. R. 5 C. P. 22.

As to covenants as to performance of a positive precedent, see *Benson v. B. & F.*, 12 L. J. 236.

Conditions as to payment of rent.—(1)—The lessor can recover rent accrued due under a lease whether of fee or simple contract, and whether there has been an actual occupation under the demise or not. (1 Wms. Saund. 341, 342, 343.)

On a covenant
to pay rent
the
lessee
remains
liable even
after as-
signment.

When the lessee is obliged and there is a covenant for the payment of rent, then the lessee may have assigned the lease, and the landlord have agreed to the assignee, the lessee remains liable (1 Wms. Saund. 342, 3 Wms. Saund. 343, 344), and usually protects himself in such circumstances by a covenant by the assignee to indemnify him. There is, however, an implied promise to indemnify. (See *Merry*.) The mere reservation of rent in a lease by deed in the absence of a covenant for payment of it, would not render the lessee liable after assignment. (*Widdowson v. Newhouse*, 5 East, 414.)

An assignment of the interest in a lease by the lessor will not affect the lessee's covenants, whether to pay rent or otherwise. (*Toler v. Sargent*, 1 B. & C. 411.)

In an action for rent the plaintiff must establish one of two things, either privity of estate or privity of contract. The benefit of parol contracts does not run with the reversion. Therefore where S. made a parol lease to M. from year to year, and M. by deed assigned his interest to a third party, and S. assigned his reversion to the plaintiff, it was held, though neither S. nor the plaintiff had accepted the third party as their tenant, that the plaintiff could not maintain an action for rent in arrears against M. (*11 Exch. 400*; *Mowhouse*, 9 Q. B. Div. 364.) Where the lessor has merely assigned a portion of his reversion, the covenant to pay rent may be divided. (*Mayor of Sarum v. Thomas*, 10 Q. B. Div. 487.)

Liability
of tenant
for repairs.

Liability of the tenant.—It is usual in leases of houses to introduce a covenant to repair during the term, and to leave in a proper state of repair, and also a covenant to repair after notice. These covenants are usually distinct and independent, but they may be so framed as only to form one covenant, so that the one is engrafted on the other. In the former case, a tenant is liable for not-repair, though no notice to repair has been given; in the latter case no liability arises until after notice to repair has been given. (See *Woodfall's Landlord and Tenant*, p. 464, which will be useful for determining when the covenants are separate and when independent.) A branch of a covenant to put in repair is not a continuing one. (*See B. & C. v. Grogery*, 1 L. R. 2 C. P. 133.)

No contract to repair is implied from the fact of the relation of landlord and tenant being created. (*Stradon v. Christman*, 10 Q. B. 135; and see *Grogery v. B. & C.*, 1 L. R. 2 C. P. 133.)

Where the tenant is bound to keep the demised premises in repair, the same being the point, repairing by the landlord, the repairing by the landlord is a question of precedent; the tenant's obligation on the covenant. (*Noble v. Riddell*, 20 L. J. Q. B. 130; *Cloward v. Grogery*, *supra*.)

Measure of
damages
in action
for non-
repair.

Measure of damages.—In actions for breaches of covenant or promise to repair, the measure of damages during the continuance of the lease is the diminution of the value of the reversion. (*Turner v. Lamb*, 14 M. & W. 412; *Do v. Rowlands*, 9 C. & P. 734; *Smith v. Pratt*, 23 L. J. Ex.

Action for Rent and Royalty on Lease of Colliery, and for Breach of Covenant to work it in a miner-like Manner.

1. By a lease under seal from the plaintiff and A. B. to J. S., dated the 17th of October, 1880, of the Free Hope Colliery, in

84; *Mills v. East London Union*, L. R. 8 C. P. 79; *Williams v. Williams*, L. R. 9 C. P. 659.) Where the landlord's interest in the lease is determined by forfeiture or otherwise, consequent upon the tenant's breach of covenant to repair, the preceding test would be inapplicable, and the measure of damages would be the value of the landlord's term, or, if the forfeiture was for other breaches personal to the landlord as well, the sum it would cost to put the premises in the state of repair agreed upon. (*Davies v. Underwood*, 27 L. J. Ex. 113; 2 H. & M. 570.) The measure of damage also depends on the age, character, and state of the premises on the creation of the tenancy, the tenant's liability being measured by reference to the condition of the premises at that time. (*Payne v. Haine*, 16 M. & W. 541; *Stanley v. Tourgood*, 3 Bing. N. C. 4; *Burdett v. Withers*, 7 A. & E. 136.) The fact that the dilapidation prevented the landlord from letting, while the repairs were being done, may *seem* be considered where special damages are claimed. (*Woods v. Pagar*, 1 Bing. N. C. 467.) If a second action be brought on a covenant to keep in repair, the verdict in the former action may be given in evidence in mitigation of damages.) (*Conard v. Gregory*, *supra*.)

State of premises at commencement of tenancy to be considered.

Where the tenant has sublet, and the underlessee has neglected to repair, the tenant in an action against him may claim as special damage the forfeiture of his lease if it was solely on account of that breach of covenant. (*Clow v. Brongden*, 2 M. & G. 39), or the loss sustained by him through being sued for breach of the covenant to repair. (*Walker v. Hatten*, 10 M. & W. 249.)

Tenant may recover from sub-tenant for forfeiture of lease for non-repair.

In cases where the lessor covenants to repair, the tenant, in an action for non-repair, may allege as special damage that he was unable to carry on his trade in the premises, and was obliged to remove. (*Green v. Eales*, 2 Q. B. 225.)

As to relief against forfeiture for non-repair, see now the Conveyancing and Law of Property Act, 1881, sect. 14.

Covenant to insure.—The covenant to keep buildings insured against fire runs with the land, as the 14 Geo. 3, c. 78, s. 83, enables the landlord to have the insurance money laid out in reinstating the premises, so that the covenant with the aid of the statute amounts to a covenant to repair. (*Vernon v. Smith*, 5 B. & A. 1.) The operation of this section is not confined to the metropolitan district. (*Ex parte Gorley*, 34 L. J. Bkcy. 1.)

Covenant to insure runs with land.

A covenant "to insure at all times previously to the expiration of the term," is satisfied by an insurance effected forthwith after the execution of the lease.

A covenant to insure in the name of A. is not satisfied by an insurance in the joint names of A. and the lessee. (*Pennial v. Harborne*, 11 Q. B. 368. But see *Harcus v. Middleton*, 22 L. J. Ch. 746.)

Covenant to cultivate in a husbandlike manner, &c.—Actions on covenants of this kind are not very common, particularly during recent years. The reader is referred to Woodfall's Landlord and Tenant, 11th ed., for the law on the subject.

Covenant to cultivate in husbandlike manner.

If the plaintiff means to rely on bad cultivation by the defendant, he should state that distinctly as his ground of complaint, as under a claim for non-cultivation, he would not be allowed to give evidence of bad culti-

the parishes of A. & K., Lancashire, for seven years from the 29th of September, 1883, J. S. covenanted with the plaintiff and A. B. as follows :—

(1) To pay a yearly minimum or dead rent of £150, payable

Covenant
not to
carry on
particular
trade.

vation merely, though it is probable that the plaintiff would in such a case obtain leave to amend on the trial on terms, unless where on the amendment he would only be entitled to merely nominal damages. (*Times Insurance Co. v. Hawke*, 28 L. J. Ex. 317.) Where covenants of this kind are controlled or modified by particular customs as to the mode of cultivation or as to the rights of the parties on the termination of the tenancy, the plaintiff should mention them in the statement of claim. If, however, the plaintiff ignores the custom, but the defendant relies on it, it is for the latter to set it out in his statement of defence.

Covenant not to carry on a particular trade on the premises.—A covenant not to do anything on the demised premises which may be a nuisance to the occupiers of the adjoining premises, was held not to be broken by opening a national school thereon. (*Harrison v. Good*, L. R. 11 Eq. 338.) A covenant not to use the premises as a beerhouse, inn, or public-house for the sale of spirituous liquors is not broken by the sale of beer by retail under a license preventing its being drunk on the premises. (*London & North-Western Rail. Co. v. Garnett*, L. R. 9 Eq. 26.) Nor is a covenant not to use a building as a public-house for the sale of wine, beer, malt liquors, or spirits broken by such sale under a similar license. (*Pearse v. Coates*, L. R. 2 Eq. 689.) A covenant that the trade or calling of a hotel or tavern-keeper, publican, beershop-keeper, or seller by retail of wine, beer, spirits, or spirituous liquors should not be carried on on the premises, was held, per James, V.C., on special grounds, not broken by the sale of wine in bottles by a grocer in the ordinary course of his trade. (*Jones v. Bone*, L. R. 9 Eq. 674. But see *Feilden v. Slater*, L. R. 7 Eq. 523, in which a decision apparently inconsistent with that in *Jones v. Bone* is given, and which must be considered as overruled by it.)

As to the construction of covenants not to carry on a particular trade, and to pay an extra rent if it should be carried on, see *Weston v. Managers of Metropolitan Asylum District*, 8 Q. B. Div. 387.

Covenant
not to
assign.

Covenant not to assign.—A sub-demise is not a breach of this covenant, except it be of the whole term. (*Beardman v. Wilson*, L. R. 4 C. P. 57. See 1 Sm. L. C. 7th ed., Spencer's case.) It would be different if the covenant were "not to let, or assign over" the demised premises, "or any part thereof." (*Gregson v. Harrison*, 2 T. R. 425.) Where the covenant contained words against "demising," "leasing," or "aliening," the premises, or any part thereof, for the term, or *any part thereof*, it was held a breach to give a partner of the tenant the exclusive possession of part of the house. (*Dingley v. Saler*, 1 M. & S. 297.) Taking a lodger is not a breach of a covenant not to under-let the house, unless there be a distinct agreement for the exclusive occupation of particular rooms. (*Greenland v. Tapscott*, 1 C. M. & R. 59.) An assignment by one joint assignee of a lease to the other is a breach of the covenant not to assign. (*Varley v. Coppard*, L. R. 7 C. P. 505.)

Where as-
signment
subject to
consent.

A covenant not to assign without the consent of the lessor, such consent not to be arbitrarily withheld, does not entail a forfeiture, or enable the lessor to sue when the tenant assigns after the lessor has arbitrarily refused his consent. The tenant's remedy is not to sue for the arbitrary refusal, but to assign without consent. The refusal must be unfair and unreasonable to enable the tenant to disregard it, and a refusal upon an expectation that the property would soon be taken under the Lands Clauses Act is not unfair and unreasonable. (*Trehear v. Bigge*, L. R. 9

by instalments on the usual quarter day, and a yearly rent or royalty of £—— per foot of thickness for every statute acre surface measure of coal worked or gotten during the time after the first 150 feet ;

Ex. 147, 155 ; 43 L. J. Ex. 95 ; 22 W. R. 843 : *Sear v. House Property Investment Society*, 16 Ch. Div. 387.)

Measure of damages for breach of covenant not to assign.—The measure of damages in an action for breach of covenant not to assign is such an amount as will put the plaintiff in the same position as if the covenant had not been broken. (*Williams v. Earle*, L. R. 3 Q. B. 739 ; 37 L. J. Q. B. 231.)

Covenant or promise to yield possession on the determination of the lease.—In actions under this covenant or promise the landlord is entitled to recover all the loss he has sustained by not being put in entire possession of the premises at the end of the term ; thus he is entitled to a sum equivalent to the rent he has lost, and to the costs of an ejectment against an under-tenant, who has wrongfully held over. (*Henderson v. Squire*, L. R. 4 Q. B. 170 ; 38 L. J. Q. B. 73 ; 19 L. T. 601.) So he may recover for damages occasioned by his having to compromise an action by a person to whom he had let the premises. (*Bramley v. Chenterton*, 2 C. B. N. S. 592 ; 27 L. J. C. P. 23.) And the acceptance of rent for the period of holding over does not affect the landlord's right to recover on the promise or covenant. (*Ib.*)

Actions against assignees of lease.—The 8 & 9 Vict. c. 106, s. 3, requires assignments to be by deed, but as leases for the whole remaining terms are but assignments thereof (*Beardman v. Wilson*, L. R. 4 C. P. 57), if the remainder of the term does not exceed three years, it is clear that the assignment of it may in effect be made by parol in the form of an underlease, as neither the Statute of Frauds nor the 8 & 9 Vict. c. 106, applies to such a case. It seems that an executor *de son tort*, who has entered on the demised premises and taken possession of the lease, will be held liable as an assignee. (*Paull v. Simpson*, 9 Q. B. 365.) Where a person has entered into possession of or received the rents and profits of premises demised to the intestate, and paid the rent reserved thereon, he is estopped from denying that he is the assignee of the lease, even though he is not chargeable as executor *de son tort*. (*Williams v. Heales*, L. R. 9 C. P. 177 ; 43 L. J. C. P. 80 ; 30 L. T. 20 ; 22 W. R. 317.)

A trustee to whom a debtor's estate has been assigned for the benefit of creditors is liable as assignee if he has not repudiated the lease. (*White v. Hunt*, L. R. 6 Ex. 32 ; 40 L. J. Ex. 23.) Where the assignee of a lease became bankrupt and his trustee disclaimed, it was held that the trustee was at all events liable for rent falling due between the adjudication and disclaimer. (*Smith v. North*, L. R. 7 Ex. 242. But see now *Titterton v. Cooper*, 9 Q. B. D. 473.)

A covenant not to assign without license where the assigns are named, binds the assignee of the lease, although the assignment was made without license. (*Williams v. Earle*, L. R. 3 Q. B. 739.) But it is only the assignee of the whole term that is bound. (*West v. Dobb*, L. R. 5 Q. B. 460, Ex. Ch.) The assignee can resist an action for breach of covenant by showing that he assigned away before breach, as he is only liable to the lessor for breaches during the time he is assignee. (*Paul v. Viper*, 8 B. & C. 486.)

The execution of the assignment may be sufficient without delivery of it to the assignee, as where it remains in the hands of the assignee's solicitor, who kept it under a lien. (*Odell v. Wake*, 3 Camp. 394.) Notice of the assignment to the plaintiff is unnecessary. The fact that the

Measure of damages for breach of covenant not to assign.

Covenant to yield up at termination of term.

Actions against assignees of lease.

Trustee under assignment for benefit of creditors liable on lease not repudiated.

Assignment to pauper not invalid on

(2) To work and get the coal in a usual and miner-like manner.

2. On November 1, 1881, A. B. died.

3. On November 7, 1881, J. S. assigned to the defendant.

ground of
fraud.

assignment was made to a man of straw in order to get rid of the liability would not affect its validity as amounting to a fraud. (*Lekens v. Nash*, 2 Str. 1221; *Osborne v. Currie*, 2 Madd. 330; *Hopkinson v. Loring*, 11 Q. B. D. 92.) But if there was a secret trust in favour of the assignor, this would be a fraud, and would avoid the assignment. (*Ex parte Budd*, 31 L. J. Ch. 4, and *Ex parte Bugg*, 35 L. J. Ch. 43.) The assignee may after the assignment be sued for breaches by him before assignment. (*Harley v. King*, 2 C. M. & R. 18.)

An assignee is not liable for breaches committed before the assignment to him. (*See Curd v. Gregory*, L. R. 2 C. P. 153.)

A trustee in bankruptcy becomes assignee in law of the leasehold estates of the bankrupt, but, under s. 55 of the Bankruptcy Act, 1883, he is entitled, with the leave of the Court, to disclaim unprofitable leases. If after notice from the landlord to elect he should not disclaim within the time appointed, he may still relieve himself of liability by assigning to a pauper. (*Hopkinson v. Loring*, 11 Q. B. Div. 92.) If he should neither disclaim nor assign, he becomes personally liable in respect of all breaches of covenant in the leases committed after his appointment. (*Titterton v. Cooper*, 9 Q. B. Div. 473; *Wilson v. Willani*, 5 Ex. D. 135.) Where other persons than the bankrupt are interested in the lease, the disclaimer by the trustee only operates so far as to relieve the bankrupt, his estate, and the trustee, from liability. (*Harding v. Prece*, 9 Q. B. Div. 281; *East & West India Dock Co. v. Hill*, 22 Ch. Div. 14.)

Actions for
double
rent.

11 Geo. 2,
c. 19.

Tenants holding over actions for double rent.]—By the 11 Geo. 2, c. 19, s. 18, "in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her, or them holden at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her, or their executors or administrators shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid, to be levied, sued for, and recovered at the same time and in the same manner as the single rent or sum before the giving such notice, could be levied, sued for, and recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as afore-said."

Act only
applies
where
tenant has
given
valid
notice.

It has been held that this statute only applies where the tenant had the power of determining his tenancy by notice, and has given a valid notice for that purpose. (*Johnstone v. Huddleston*, 4 B. & C. 922.) To bring a case within this provision, the holding over must be wilful and contumacious, and not either by mistake or bona fide though unfounded claim of right. (*Wright v. Smith*, 5 Esp. 203; *Swinfen v. Bacon*, 30 L. J. Ex. 33 and 368.)

A person to whom the landlord granted a lease to commence on the determination of the defendant's tenancy is not a person entitled to the possession within the meaning of the above enactment, and cannot consequently maintain an action for double value under it. (*Blatchford v. Cole*, 28 L. J. C. P. 140.) The double value given by this Act is in the nature of a penalty, and therefore action must be brought to recover it within two years.

Landlord
may claim

Independently of this provision a landlord may claim special damages from an overholding tenant in respect of damages, to which he has been

4. £300 is now due by the defendant for dead rent, and £174 for royalties.

5. The defendant has worked the mine, but not in a usual or

rendered liable to a third person, to whom he has let the premises, and is unable to deliver possession in consequence of the defendant holding over. (*Bramley v. Chesterden*, 27 L. J. C. P. 23.)

Actions for double value.—By 4 Geo. 2, c. 28, s. 1, it is provided that "in case any tenant or tenants for any term for life, lives, or years, or other person or persons who are or shall come into possession of any lands, tenements, or hereditaments by, from, or under or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements or hereditaments after the determination of such term or terms, and after demand made and notice in writing given, for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized, then and in such case such person or persons so holding over shall, for and during the time he, she, and they shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements, and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments so detained, for so long time as the same are detained, to be recovered in any of His Majesty's Courts of Record by action of debt, whereunto the defendant or defendants shall be obliged to give special bail, against the recovering of which said penalty there shall be no relief in equity."

The defendant may show that the plaintiff waived the notice to quit or demand of possession. Before the Judicature Acts such waiver need not have been specially pleaded. (*Rawlinson v. Marriot*, 16 L. T. N. S. 207.) But that would scarcely hold now. Where the plaintiff accepted rent due from the defendant after the expiration of the notice, it is a question whether it was accepted in part satisfaction of the double value or as a waiver of it. (*Ryall v. Rich*, 10 East, 52.)

Forfeiture of the lease for breach of covenant.—It has been and is usual to insert in lease a clause giving the lessor power to re-enter and to avoid the lease on any breach of covenant by the lessee. This clause of forfeiture has long been relieved against in cases where the breach was non-payment of rent, by the Court of Equity, and afterwards under statute. And by a recent statute relief might be obtained for a trivial breach of a covenant to insure. But except in these cases, and except where by acceptance of subsequent rent or otherwise the lessor waived the breach, or except in cases of accident or surprise, no relief could be obtained until the passing of the Conveyancing and Law of Property Act, 1881, which by s. 14 enacts (1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief, and the Court may grant or refuse relief as the Court, having regard to

special damage for overholding independently of Act.

Actions for double value.

4 Geo. 2, c. 28.

Defence that plaintiff waived notice or demand of possession.

miner-like manner. He has improperly taken coal from the main engine dip, and neglected to leave proper pillars and supports in the dip and headings, so that the walls of the mine have fallen in, and the distant parts of the mine have been closed. In July, 1888, the defendant negligently allowed a fire to break out in the mine, and improperly flooded the mine with water.

The plaintiff claims :—

- (1) £474 for rent and royalties, and interest until payment or judgment; and
- (2) £5,200 damages for the defendant's negligence and breach of covenant.

the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a Free Farm Rent or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs, and assigns; and a lessor includes an original or derivative underlessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend (i) to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessees' interest; or (ii) in case of a mining lease to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary. This enactment applies to leases made before as well as after the passing of the Act, and even to actions commenced before and pending at the time of the passing of the Act. *Quilter v. Mapleson*, 9 Q. B. Div. 672.

Defence.

The defendant says :

1. The defendant assigned the lease and demised premises to C. D. by deed dated March 24, 1882.
2. The defendant has paid to the plaintiff all the dead rent and royalties accrued due up to March 24, 1882.
3. Nothing is now due by the defendant to the plaintiff for dead rent or royalties.
4. The defendant denies that he worked the mine in an unusual or not in a miner-like manner, or that he has improperly or at all taken coal from the main engine-dip, or neglected to leave proper pillars and supports in the dip and headings, or that in consequence, or at all, the walls of the mine, or any of them, have fallen in, or the distant parts of the mine, or any of them, been closed, or that in July, 1883, or at any other time, he negligently, or at all, allowed a fire to break out in the mine, or that he improperly, or at all, flooded the mine with water.

Landlord against Tenant for Breach of Covenant to Repair.

1. By a repairing covenant contained in a lease under seal from the plaintiff to the defendant, dated the 1st of January, 1876, of a house No. 401, Piccadilly, for seven years from the 25th day of December, 1875, the defendant covenanted to keep the premises in such repair and condition as therein mentioned.
2. The premises were, during the term, out of such repair as was required by the covenant.
3. They were yielded up out of such repair at the expiration of the term.
4. Particulars of dilapidations were delivered to the defendant's solicitor on the — day of —, 18—, and exceeded three folios.

The plaintiff claims £—— damages.

Defence.

The defendant says :

1. It was a condition precedent to the performance of the

defendant's covenant to keep the premises in repair, that the plaintiff should put the premises in repair.

2. The plaintiff never put the premises in repair.

3. Alternatively, the premises were not, during the term, out of such repair as was required by the defendant's covenant.

4. They were not yielded up out of such repair at the expiration of the term.

*Action by Tenant against Landlord for Breach of implied
Promise of Quiet Enjoyment.*

1. On the 25th day of March, 18—, the plaintiff became tenant from year to year to the defendant of a house, No. 30, T. Road, in the county of M., and the defendant agreed that the plaintiff should have quiet enjoyment of the said premises during the said tenancy, and to give the plaintiff six months' notice to quit the said premises, such notice expiring on any subsequent 25th March, if the defendant should require possession thereof.

2. The defendant did not give the plaintiff such six months' notice as aforesaid, and during the continuance of the said tenancy, *i.e.*, during the month of June, 1884, the Metropolitan Board of Works, then having a good title to the house, entered it and evicted the plaintiff therefrom.

3. The plaintiff thereby lost the use and occupation of the said premises and the profits of the business which he then carried on upon the said premises, and was put to great expense in providing himself with other premises, and by being compelled to remove his goods thereto.

Particulars of special damage:—

18—.	Loss of profits (say)	£100	0	0
	Increased rent paid Mr. A. B. for new premises until March 25, 1884	50	0	0
	Paid J. S. for removing goods and furniture	21	0	0
		£171	0	0

The plaintiff claims £500.

Defence.

The defendant says that :

1. He did not agree that the plaintiff should have quiet enjoyment of the house and premises or to give the plaintiff six months' notice to quit expiring on any subsequent 25th of March, or any notice to quit.

2. It was a term of the agreement of tenancy that if the Metropolitan Board of Works should require the house and premises the tenancy should forthwith determine without notice to quit.

3. Before the breach complained of the Metropolitan Board of Works required the house and premises, and lawfully took them under their compulsory powers.

4. Alternatively, if the defendant agreed to give the plaintiff the notice to quit alleged, the plaintiff before the breach complained of waived that agreement—Particulars : a letter from plaintiff to defendant, dated the 17th of October, 1883, and a letter from defendant to plaintiff, dated the 20th of October, 1883.

5. Alternatively, before the breach complained of, the defendant on the 23rd of December, 1883, gave the plaintiff notice to quit on the 24th of June, 1884, and the plaintiff thereupon agreed to accept the said notice.

Landlord against Tenant whose Term has Expired to Recover Possession of the Premises and Double Value for Holding Over.

1. The plaintiff is entitled to the possession of a farm and premises called Church Farm, in the parish of St. James, in the county of Surrey, which were let by the plaintiff to the defendant for the term of three years from the 29th of September, 1880, at the yearly rent of £300, which term has expired [or as tenant from year to year from the 29th of September, 1880, at the yearly rent of £300, which said tenancy was duly determined by notice to quit expiring on the 29th of September, 1883].

2. On the 29th of September, 1883, the plaintiff made demand and gave notice in writing to the defendant pursuant

to the statute 4 Geo. II. c. 28, for delivering possession of the demised premises to the plaintiff, but the defendant wilfully holds over and still keeps the plaintiff out of possession of the demised premises.

3. The yearly value of the demised premises is £400.

The plaintiff claims :—

(1) Possession ;

(2) Double the yearly value so long as the defendant continues to hold over, calculated from the 29th of September, 1883.

Action by Tenant for Breach of Covenant for Title and Quiet Enjoyment.

1. By a lease under seal dated the 30th of October, 1883, the defendant demised to the plaintiff the house No. 14, Barnfield Meadows, in the parish of St. John, in the county of Rutland, for seven years.

2. By the lease the defendant covenanted with the plaintiff that he then had full power so to demise the premises and that the plaintiff should quietly enjoy the same.

3. The defendant had not then full or any power to demise the premises.

4. On the 21st of November, 1883, one J. S., the owner of the premises, lawfully entered the premises and evicted the plaintiff therefrom.

The plaintiff claims £1000 damages.

Defence and Counter-claim.

Defence.

The defendant says that :

1. He had full power to demise the premises to the plaintiff for seven years from October 30, 1883.

2. J. S. did not evict the plaintiff.

3. If he did, he did so unlawfully and without any title so to do, and the plaintiff, by collusion with J. S., submitted to a pretended eviction by J. S.

Counter-claim.

The defendant says that :

1. By the lease the plaintiff covenanted to pay a yearly rent

for the premises of £80, payable quarterly, and to keep the premises in such repair and condition as therein mentioned.

2. Two quarters' rent is unpaid.

3. The premises were during the term and are out of such repair as was required by the covenant.

4. Particulars of dilapidations were delivered to the plaintiff on the 17th of July, 1884, and exceed three folios.

The defendant counter-claims :

(1) £40 and interest until payment or judgment ;

(2) Damages.

Action against Landlord for Tillages, Improvements, &c. (a).

1. By a lease under seal dated the 16th of April, 1874, the defendant demised to the plaintiff for seven years from Lady-day, 1874, the " Little Rectory Dale " farm, in the parish of St. Sebastian, in the county of Stafford, and covenanted at the conclusion of the term to pay to the plaintiff the usual allowances according to the custom of the country for the plaintiff's tillages, hay and straw and manure left on the farm, and fallows.

2. When the term ended the plaintiff was entitled to be paid £571 11s. 6d. in respect of his said tillages, hay, straw, and manure, and fallows.

3. Full particulars of the said tillages, hay, straw, and manure, and fallows, were delivered to the defendant before action, and exceed three folios.

The plaintiff claims £571 11s. 6d.

Action against Landlord for Breach of Covenant to make Improvements, &c., on the Premises.

1. By a lease under seal dated October 10th, 1883, whereby the defendant demised the dock, houses, and premises called the " Commercial Repairing Dock," in the parish of R., in the county of Surrey, to the plaintiff from the 29th of September, 1883, for 21 years at a rent, the defendant covenanted with the

(a) See *Manuel v. Norton*, 22 Ch. Div. 769. As to claims for agricultural improvements, see the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), and the statute 45 & 47 Vict. c. 61.

plaintiff that he would forthwith lengthen the dock by 50 feet, and put the demised premises in the state of repair and condition therein mentioned.

2. The defendant has not lengthened the dock or put the premises in the state of repair and condition therein mentioned, whereby the plaintiff has suffered damage.

The plaintiff claims £20,000 damages.

Limitation (a).

Defence of the Statute of Limitation to Action on Simple Contract.

The defendant says that :

1. The debt was barred by the Statute of Limitations, 21 James I. c. 16.

Table of
Statutes of
Limitation.

(a) The following tabular view of the limitation in the various actions will probably be found useful.

Action.	Period of Limitation.—Statute or Authority.
Account, action of	Six years. 21 Jac. 1, c. 16, s. 3 ; 19 & 20 Vict. c. 97, s. 9.
Administrators. See <i>Executors</i> .	
Admiralty, suits for seamen's wages	Six years. 4 Anne, c. 16, s. 17.
Adowsons, recovery of	Not after three incumbencies, extending over a period of sixty years' adverse possession. Incumbencies after lapse, but not after promotion to bishopric, are reckoned ; and 100 years' adverse possession is a complete bar, although three incumbencies have not elapsed. 3 & 4 Wm. 4, c. 27, ss. 30, 31, 33.
Annuity, action of	Twelve years. 37 & 38 Vict. c. 57, s. 8.
Army, navy, marines, customs or excise, officers of, actions against, for anything done in execution of the Custom laws	One month, and one month's notice of action. 39 & 40 Vict. c. 36, ss. 268, 272.
Assault, battery, wounding, or false imprisonment	Four years. 21 Jac. 1, c. 16, s. 3.
Assumpsit or promises, action on	Six years. 21 Jac. 1, c. 16, s. 3.
Award, action of debt upon, where the submission was not by deed	Six years. 3 & 4 Wm. 4, c. 42, ss. 3—7.
— but if by deed	Twenty years. <i>Ibid</i> .
Battery. See <i>Assault</i> .	

Reply.

The plaintiff says that :

1. Within six years of the commencement of this action, that is to say, on the 1st of June, 1882, the defendant in writing

Action.	Period of Limitation.—Statute or Authority.	Table of Statutes of Limitation.
Bill of exchange or promissory note, payable at a certain period after date	Within six years after it falls due, even though given to secure an advance made before or after date of bill. 21 Jac. 1, c. 16. (See Byles, 12th ed., p. 344, and see <i>Wheatly v. Williams</i> , 1 M. & W. 533.)	
The like, payable on a contingency	Within six years of the occurrence of such contingency. <i>Ibid.</i>	
Bill of exchange or promissory note, payable at sight or on demand	Within six years after date. 26 Jac. c. 16 (45 & 46 Vict. c. 61, s. 10). See Byles on Bills, 12th ed., p. 345.	
The like, payable at a certain period after demand	Within six years from the expiration of that period after demand. <i>Ibid.</i>	
Bond or specialty	Twenty years. 3 & 4 Wm. 4, c. 42, s. 3.	
Calls in respect of shares	Twenty years. Companies Act, 1862, ss. 16 and 75.	
Case (except for words actionable in themselves)	Six years. 21 Jac. 1, c. 16, s. 3, and 3 & 4 Anne, c. 9, s. 2.	
Cheque, action for non-payment of.	Six years from refusal to pay. 21 Jac. 1, c. 16, s. 3, and see <i>Pott v. Clegg</i> , 16 M. & W. 321.	
Cheque, action for money paid on .	Six years from payment by banker. <i>Ibid.</i> ; and see <i>Gardon v. Bruce</i> , L. R. 3 C. P. 300.	
Common and other profits à prendre, claims to	These cannot be defeated after thirty years' enjoyment by showing their <i>first</i> enjoyment at any prior period. Sixty years' enjoyment gives an indefeasible right, unless under written agreement. 2 & 3 Wm. 4, c. 71, s. 1.	
Constables, actions against . . .	Six calendar months, and one month's notice of action. See 24 Geo. 2, c. 44, s. 8. As to special and county constables, see 1 & 2 Wm. 4, c. 41, s. 19, and 2 & 3 Vict. c. 93, s. 9. As to borough, 5 & 6 Wm. 4, c. 76, s. 133, and as to metropolitan, see 2 & 3 Vict. c. 71, s. 53.	

acknowledged the existence of the debt and promised to pay the same.

2. On the 1st of July, 1883, the defendant paid to the

Table of
Statutes of
Limitation.

Action.	Period of Limitation.—Statute or Authority.
County Court Acts, action against persons for anything done in pursuance of	Within three calendar months. 9 & 10 Vict. c. 95, s. 138.
Copyhold fine	Six years. 3 & 4 Wm. 4, c. 42, s. 3.
Copyright, action for infringement of	Twelve calendar months after accruing of cause of action. 5 & 6 Vict. c. 45, s. 26.
And as to copyright in fine arts, see 7 Geo. 3, c. 38, s. 8; in music and drama, 3 & 4 Wm. 4, c. 15, s. 3; and in designs, 5 & 6 Vict. c. 100, s. 12.	
Corporate offices and franchises, information for usurping	Six years. 32 Geo. 3, c. 58.
Covenant, action of	Twenty years. 3 & 4 Wm. 4, c. 42, s. 3.
Crown, suits by, relating to land .	Sixty years next before suit or claim. 9 Geo. 3, c. 16; 24 & 25 Vict. c. 62, s. 1.
Debt (if not on specialty)	Six years. 21 Jac. 1, c. 16, s. 3.
— on specialty. See <i>Bond</i>	Twenty years. 3 & 4 Wm. 4, c. 42, s. 3.
— <i>qui tam</i> . See <i>Penal Statutes</i> .	
Deed	Twenty years. <i>Ibid</i> .
Defamation. See <i>Libel</i> ; <i>Slander</i> .	
Detinue	Six years. 21 Jac. 1, c. 16, s. 3.
Distress, action for wrongful. See <i>Trespass</i> .	
Dower	No arrears or damages on account thereof can be recovered for more than six years. 3 & 4 Wm. 4, c. 27, s. 41. Twelve years to bring the action. Thirty years longest time in respect of disability. 37 & 38 Vict. c. 57, ss. 1, 5; and see <i>Marshall v. Smith</i> , 5 Giff. 37; 34 L. J. Ch. 189.
Easement. See <i>Trespass</i> ; <i>Case</i> .	
Ecclesiastical Courts :—For incontinence or brawling by a clerk in holy orders, striking in church, fornication, &c.	Eight calendar months. 27 Geo. 3, c. 44, s. 2.

plaintiff the sum of £5 in part payment of the debt due upon the said contract, for which sum the plaintiff has given credit in this action.

Action.	Period of Limitation.—Statute or Authority.	Table of Statutes of Limitation.
Ecclesiastical or eleemosynary corporation sole recovering land or rent	Within two incumbencies and six years after a third incumbent appointed, if these periods together amount to sixty years; if not, then such further time in addition as will make up sixty years. 3 & 4 Wm. 4, c. 27, s. 29.	
Ejectment	Twelve years; six years allowed from [ceasing of disabilities, but never to exceed thirty in all. 37 & 38 Vict. c. 57, ss. 1, <i>et seq.</i>	
Escape, action for	Six years. 3 & 4 Wm. 4, c. 42, s. .	
Executors or administrators And see "Injuries to Testator's or Intestate's Real Estate," <i>infra</i> .	If time have not expired before testator's or intestate's death, then at any time within a year after his death. <i>Ibid.</i> s. 2.	
Execution	Six years from judgment unless by leave. Jud. Act, 1875; Rules of the Supreme Court, 1883, Order XLII. rr. 22, 23.	
False imprisonment. See <i>Assault</i> .		
Fy. fa., money levied on any writ of, action for	Six years. 3 & 4 Wm. 4, c. 42, ss. 3 to 6.	
Franchises, claims to	They shall not be defeated after thirty years' uninterrupted enjoyment, by showing benefits first enjoyed previous to such period; sixty years' enjoyment confers an indefeasible right, unless under express agreement by deed or writing. 2 & 3 Wm. 4, c. 71, s. 1.	
Hundred, action against, for damages done by rioters	Three calendar months. 7 & 8 Geo. 4, c. 31, s. 3.	
Indemnity	Six years from date of damnification. 21 Jac. 1, c. 16, and see <i>Reynolds v. Dayle</i> , 1 M. & Gr. 753.	
Injuries. See <i>Actions under various headings, e.g., Assault, &c.</i>		
Injuries to testator's or intestate's real estate	If injury committed within six months before his death, then within a year after his death. 3 & 4 Wm. 3, c. 42, s. 2.	

Defence of the Statute of Limitations to an Action on a Specially mortgaged debt.

The defendant says that :

1. The debt was barred by the Statute of Limitations, 37 & 38 Vict. c. 57.

**Table of
Statutes of
Limitation.**

Action.	Period of Limitation—Statute or Authority.
Actions of tort against executor or administrator, for wrong done by testator, intestate, real or personal property of others	If done within six months of his death, then within six calendar months after entering upon office, provided the damages rank as simple contract debts.
Judgment revival	Every six years. 15 & 16 Vict. c. 76, s. 128; and Jud. Act, 1873; Rules of the Supreme Court, 1883, Order XLIII. r. 22.
Justices of the peace, actions against	Six calendar months, and one month's notice of action. 11 & 12 Vict. c. 44, ss. 5, 9.
Land, right of entry for the recovery of	Twelve years. 37 & 38 Vict. c. 57, s. 1. No descent cast or discontinuance after 31st Decr. 1883, shall defeat it. 3 & 4 Wm. 4 c. 27, s. 39.
— civil right of Crown in suits for	Sixty years. 2 Geo. 3, c. 16.
Legacies	Twelve years. 37 & 38 Vict. c. 57, s. 5.
Libel	Six years. 21 Jac. 1, c. 16, s. 3.
Light and Air, right to	After twenty years' uninterrupted enjoyment; no disability prevents the running of this time. 2 & 3 Wm. 4, c. 71, s. 3.
Local authorities acting under Public Health Act, 1875, actions against	Six months. 38 & 39 Vict. c. 54, s. 264.
Mandamus	Not after many years' delay. No statute. <i>Re v. The Commissioners of Cockermouth Inclusion</i> , 107, 1 Barn. & Adol. 387; and see <i>Ward v. Leach</i> , 29 L. J. Q. B. 40.
Merchants' accounts	Six years. 19 & 20 Vict. c. 97, s. 1.
Mortgaged lands, action to recover.	Within twelve years <i>next after the last payment of any part of the principal money or interest.</i> 7 Wm. 4 & 1 Vict. c. 28, and 37 & 38 Vict. c. 57, s. 9.

Reply.

The plaintiff says that :

1. Within 12 years of the commencement of this action, that is to say, on December 12, 1875, the defendant, by his

Action.	Period of Limitation—Statute or Authority.	Table of Statutes of Limitation.
Nuisance. See <i>Case</i> .		
Penal Actions.	Two years when forfeiture goes to the party grieved ; two years when forfeiture goes to Crown ; one year when it goes to Crown and prosecutor, and in default, then within two years by Crown. 31 Eliz. c. 5, s. 5, and 3 & 4 Wm. 4. c. 42, s. 3 ; and see 11 & 12 Vict. c. 43, s. 36, and <i>Robinson v. Currey</i> , 7 Q. B. D. 465.	
Personal estate of intestate, suit to recover from legal personal representative	Twenty years after accruing of right to a person capable of giving a discharge ; or if in meantime some part or interest in such estate has been accounted for or paid, or an acknowledgment in writing, signed by the person liable or his agent, has been given to the person entitled or his agent, twenty years after the last accounting, payment, or acknowledgment. 23 & 24 Vict. c. 38, s. 13.	
Where persons killed by accidents caused by negligence, which would have entitled them to have brought actions if death had not ensued an action may be brought for the benefit of the wife, husband, parent, or child, &c., by the executor or administrator of the deceased.	Twelve calendar months after their death. 9 & 10 Vict. c. 93, s. 3 ; and see 27 & 28 Vict. c. 95, s. 1, which provides that where there is no executor, &c., or he does not bring an action within <i>six months</i> , the persons beneficially interested may do so.	
Promissory note. See <i>Bill of Exchange</i> .		
Public Health Act, 1875, actions against persons acting under	Six months. 38 & 39 Vict. c. 55, s. 264.	
Public, local, and personal, or local and personal acts, action for anything done in pursuance of any	Two years, or in case of continuing damage, then within one year after such damage shall have ceased. 5 & 6 Vict. c. 97, s. 5.	
Qui tam. See <i>Penal Actions, supra</i> .		
Quit-rent, action of debt for	Twelve years. 37 & 38 Vict. c. 57, s. 1. See <i>Owen v. De Beauvoir</i> , 16 M. & W. 547 ; 5 Exch. 166 ; and <i>Chichester v. Hall</i> , 17 L. T. 121.	

agent A. B., paid to the plaintiff £10 on account of the interest on the mortgage debt.

Table of
Statutes of
Limitation.

ACTS.	Period of Limitation.—Statute or Authority.
<i>Quo warranto</i>	One year. 7 Wm. 4 & 1 Vict. c. 78, s. 23; 6 & 7 Vict. c. 89, s. 1; 45 & 46 Vict. c. 50, s. 225.
Real property, actions relating to	Twelve years after right accrued. 37 & 38 Vict. c. 57, s. 1.
Recognizances, proceedings upon	Twenty years. 3 & 4 Wm. 4, c. 42, s. 3.
Recovery of land. See <i>Ejectment</i> .	
Rent due under lease by deed	Twenty years. <i>Ibid.</i>
— by parol do.	Six years. 21 Jac. 1, c. 16, s. 3.
— charge, proceeding for, secured by deed	Twelve years. 37 & 38 Vict. c. 57, s. 1.
Replevin	Six years. 21 Jac. 1, c. 16, s. 3.
<i>Scire facias</i> on a recognizance	Twenty years. 3 & 4 Wm. 4, c. 42, ss. 3 to 6.
Seduction	Six years. 21 Jac. 1, c. 16, s. 3.
Service, Loss of. See <i>Seduction</i> .	
Slander, verbal (unless special damage)	Two years. <i>Ibid.</i>
— if special damage	Six years. <i>Saunders v. Edwards</i> , 1 Sid. 95.
Tithe, suit to recover the value of any	Six years from the time the tithes become due. 53 Geo. 3, c. 137, s. 4.
Trespass (except assault, battery, wounding, or false imprisonment) <i>i.e., quare cl. fr. and de bonis asportatis</i>	Six years. 21 Jac. 1, c. 16, s. 3.
Trespass for mesne profits	Six years' arrears. <i>Ibid.</i>
Trover	Six years. <i>Ibid.</i>
Way or watercourse, right of	It shall not be defeated after twenty years' uninterrupted enjoyment, by showing its <i>first</i> enjoyment, prior to such period. Forty years' enjoyment gives an absolute and indefeasible right, unless under an express agreement, by deed or writing. 2 & 3 Wm. 4, c. 71, s. 2.
Words. See <i>Slander</i> .	
Wounding. See <i>Assault</i> .	Four years. <i>Ibid.</i>

From
what time
statutes
run

From what time statutes run.—The statutes begin to run from the breach of the covenant or contract, and not from the discovery of it, as where a neglect of duty by an attorney was not discovered until after six years (*Short v. McCarthy*, 3 B. & A. 626; *Chlren v. Buckle*, 6 M. &

2. On January 17, 1877, by letter to the plaintiff's agent C. D., the defendant acknowledged the right of the plaintiff to recover the said mortgage debt and interest.

W. 680), but if the defendant has fraudulently concealed the cause of action the statute runs from the time of the discovery of the cause of action, or from the time when, with reasonable diligence, the plaintiff might have discovered it. See *Gibbs v. Guild*, 9 Q. B. Div. 59; 51 L. J. Q. B. 313; discrediting *Hunter v. Gibbons*, 1 H. & N. 459; and *Imperial Gas Co. v. London Gas Co.*, 10 Ex. 39; 23 L. J. Ex. 303. In case of breach of contract to deliver goods, the statute runs from the breach, though there has been a subsequent request for delivery and a refusal. (*East India Co. v. Paul*, 7 Moo. P. C. 85.) Where money is deposited with a banker the statute runs from the deposit, and not from demand for payment. (*Pott v. Clegg*, 16 M. & W. 321.) *Quare* when money has been deposited with a private person. Where the drawee of a bill refuses to accept and the holder gives notice thereof to the drawer, the statute runs from such notice, and not from non-payment when due. (*Whitehead v. Walker*, 9 M. & W. 506.) Where an accommodation acceptor is sued on a bill and pays the amount, he has six years from such payment in which to sue the accommodation drawer, *i.e.*, the statute runs from payment and not from the date of maturity of the bill. (*Angrove v. Tippet*, 11 L. T. N. S. 708.) Where a bill is deposited with a memorandum that it is to be a security for a balance due, the statute runs only from ascertainment of balance and demand for payment of such balance, and not from the mere creation of a debt to the holder. (*Hartland v. Jukes*, 32 L. J. Ex. 162.) In a recent case a promissory note payable three months *after demand* was found among the papers of the promisee after his death. The note was indorsed with two payments of interest, also more than twenty years old. The cause of action was held barred by statute, because (1) the payment of the interest was evidence of a demand, on which the statute would begin to run, and (2) after such a lapse of time payment must be presumed. (*Brown v. Lutherford*, 14 Ch. Div. 687; 49 L. J. Ch. 654.) See the tabular view, *ante*, pp. 374 to 380, for statement of time at which statutes begin to run in the case of bills and other causes of action.

case of contracts.

From what time statutes begin to run.

In the case of torts the date of the cause of action for the purpose of limitation is in general the committing of the injurious act, and not the occurrence of the damage resulting therefrom. (*Nicklin v. Williams*, 10 Ex. 259; *Violett v. Sympton*, 27 L. J. Q. B. 138; 8 E. & B. 344.) If the act is not in itself injurious, but only becomes so by reason of future consequences which cannot be foreseen, as in the case of excavation of land adjoining that of the plaintiff, which after a time causes a subsidence of the latter's land, the right of action dates from the actual damage. (*Renomi v. Backhouse*, 9 H. L. C. 503; 34 L. J. Q. B. 181.) Where, however, the injurious act is continuing, and causes continued damage, the right of action is also continuing. (*Whitehouse v. Fellowes*, 30 L. J. C. 1. 305; 10 C. B. N. S. 765.)

When statutes begin to run in case of torts.

When currency of statutes suspended.—The 7th section of 21 Jac. 1, c. 16, conjointly with sect. 4 of 3 & 4 Wm. 4, c. 42, provides in effect that if the person entitled to bring an action within those statutes is, at the time the cause of action accrues, under twenty-one years of age, a married woman, or insane, the time is not to begin to run until the disability shall have ceased.

When currency of statutes suspended.

By s. 11 of 19 & 20 Vict. c. 97, in the case of joint debtors, the statutes of limitation now run as to such as are not beyond the seas, though some of them may be beyond the seas; but a judgment recovered in such cases will not *per se* be a bar to another action against the absent debtors after

Where one joint debtor beyond

seas,
suspended
only as to
him.

Meaning of
"beyond
seas."

their return, but such a judgment would be a bar to a subsequent action against any joint creditor not beyond the seas at the time of the commencement of the action. (*Kendall v. Hamilton*, 4 App. Cas. 504.)

By s. 7 of 3 & 4 Wm. 4. c. 43, no part of the United Kingdom, the Isle of Man, or the Channel Islands, being dominions of the Queen, shall be deemed to be "beyond the seas," within the meaning of 21 Jac. 1, c. 16, or this Act. And by s. 12 of 19 & 20 Vict. c. 97, there is a similar proviso as to cases within 4 & 5 Anne, c. 16, or this Act (19 & 20 Vict.). This section has been held not to be retrospective. (*Flood v. Paterson*, 30 L. J. Ch. 486.)

The proviso of 19 & 20 Vict. c. 97, as to persons beyond the seas, has been held to extend as well to persons resident abroad as to natives of the United Kingdom, and the word "return" in the Acts relating to limitation does not imply that they have been in this country before. (*Lafond v. Ruddock*, 13 C. B. 813; 22 L. J. C. B. 217.)

When a statute of limitations once begins to run no subsequent disability will prevent its operation. (*Cottrell v. Dutton*, 4 Taunt. 826; *Rhodes v. Smethurst*, 6 M. & W. 351.)

Breach of
trust.

The statute of limitations cannot be set up in answer to a breach of trust (*Re Exchange Banking Co.*, 21 Ch. Div. 519), as well in respect of reality as personality. (*Banner v. Berridge*, 18 Ch. Div. 254.)

Claim by a creditor against an executor for his *deceit* in distributing the personal estate among legatees is barred after six years. (*Blabe v. Gall*, 22 Ch. Div. 820.)

The 25th section of the statute of limitations (3 & 4 Will. 4. c. 27) relates to express trusts only. (*Sands to Thompson*, 22 Ch. Div. 614.)

Revival by
subsequent
payment.

[*Revival by subsequent part payment.*]—Part payment of the debt is an acknowledgment of the debt, and takes it out of the operation of the statutes of limitations; such payment being held to be evidence of a fresh promise to pay the balance. The payment must be on account of the debt claimed to be barred, and it must be made as part-payment of a greater debt. (*Tippett v. Heane*, 1 C. M. & R. 252.) Therefore when a payment is made as and for the whole sum which the defendant admits to be due, this will not be sufficient to take the case out of the statute. (*Wagh v. Cope*, 6 M. & W. 824.) Where there are two debts, one barred and the other not, and a payment of interest on account generally is made, it is to be taken *prima facie* as paid on account of the debt not barred. (Per Lord Cranworth, *Nash v. Hodgson*, 6 D. M. & G. 474, 482; 25 L. J. Ch. 186, 188.) Part payment in goods is equivalent to part payment in money. (*Hooper v. Stevens*, 4 Ad. & E. 71.) So part payment by bill or note if so made as to imply a promise to pay the remainder, even though the bill or note may not be eventually paid. (*Turney v. Dudwell*, 3 E. & B. 136; 23 L. J. Q. B. 137.) In such case the part payment operates from the delivery of the bill or note, and not from the date when it falls due. (*Irving v. Vitch*, 3 M. & W. 90.)

Payment
by agent
sufficient
unless
authority
exceeded.

Payment by an authorised agent is generally payment by the principal; and the authority is a question for the jury. But where the defendant authorised an agent to offer a payment of a lesser sum in discharge of the whole debt, but the creditor declined, and the agent in excess of his authority paid the sum in part discharge, this was held insufficient to revive the claim. (*Linsell v. Bonsor*, 2 N. C. 241.) The principle is that the payment must be made by the person liable to pay. In a foreclosure suit, *Harlock v. Ashberry* (19 Ch. Div. 539), upon the construction of 3 & 4 Wm. 4. c. 27, s. 40, a payment of rent by a tenant of the mortgaged property to the mortgagee in consequence of a notice by the mortgagee requiring the rent to be paid to him, is not such a payment as keeps the debt alive against the mortgagor.

Payment
need not

[*By and to whom payment must be made.*]—The payment, it had been said, need not be made by the debtor or person who incurred the debt.

if clearly made on account of the debt, and on behalf of the person or persons liable for it by their successors in office. Thus payment of interest by the vestry or overseers for the time being of a parish on bills given by former overseers to secure an advance to the parish is sufficient. (*Rew v. Pettit*, 1 A. & E. 196.) But this rule is to be considered by the light of *Harlock v. Ashberry*, *supra*.

And where a payment is made to the creditor to the use of the debtor by a third person, it cannot be appropriated by the creditor so as to bar the statute. (*Waller v. Lacy*, 1 M. & G. 54.) Where A. gave B. a promissory note in order to get an advance on it from B.'s banker, and B. indorsed it to his banker, who credited him with the amount, a payment of interest by B. within the six years did not keep alive the banker's claim against A. on the bill. (*Harding v. Edgecumbe*, 28 L. J. Ex. 313.)

By the Mercantile Law Amendment Act, 1856, where there are several co-contractors or co-debtors bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor, co-debtor, executor, or administrator shall lose the benefit of the Statute of Limitations by reason of any payment by any other co-contractor, &c. It has been held that this provision applies even where such payment has been made, with the knowledge and mere passive consent of the defendant co-contractor, &c. (*Per Crompton, J.*, in *Jackson v. Wooley*, 8 E. & B. 783—4; 27 L. J. Q. B. 182.) Sect. 14 of the Act is inapplicable to a subsisting partnership. As to the effect of payment by one partner after dissolution of partnership, see *Watson v. Woodman* (45 L. J. Ch. 57).

On the other hand the payment need not be made to the creditor. Thus a payment made to one of several legatees on account of principal and interest due on a promissory note given to the trustees of such legatees to secure trust money lent to the defendant, was held sufficient to revive the debt. (*Meggison v. Harper*, 2 Cr. & M. 322.) So, payment on a note to an administrator who had not taken out administration in the diocese where the note was a *bonum notabile*, was sufficient to revive the debt in favour of a subsequent administrator *de bonis non*. (*Clark v. Hooper*, 10 Bing. 480.)

Evidence of payment.—It is not within the scope of this work to enter into the evidence necessary to sustain any allegation in the pleadings, and the practitioner is therefore referred to works bearing on this subject. It may, however, be as well pointed out that the 9 Geo. 4, c. 14, which required acknowledgments or promises *by words only* to be by writing signed by the defendant in order to keep alive or revive or create a claim which would be otherwise barred, did not, by its very terms, include acknowledgments by payments, and the third section of the Act expressly excluded the effect of payments from its operation, and the 3rd section of that Act provides that a memorandum or indorsement of any payment on a bill, note, or other writing by the person to whom such payment was made should not be sufficient evidence of a payment so as to recover a debt barred by statute. Such payments may, however, be proved by an oral admission of the defendant. (*Clare v. Jones*, 6 Ex. 573.)

Revival by acknowledgment or promise.—It is well at once to point out a distinction which does not seem to be indicated with sufficient clearness by some writers on practice, though enunciated with much distinctness and emphasis by some of the judges, between the effect of promises to pay and acknowledgments of the debt. The effect of the latter is strictly to revive the barred debt, and give it new life from the time of the acknowledgment; the effect of a promise to pay is to create a new debt, but not to revive the old one, which has no connection with the new debt created, except as supplying the consideration which makes

be made.
by debtor.

Payment
by one
co-debtor
does not
revive
statute
against
others.

Payment
need not
be made to
creditor.

Evidence of
payment.

Revival by
acknowledgment
or promise.

Distinction between effect of promise and that of acknowledgment.

Evidence of promise or acknowledgment.

Acknowledgment, &c., by agent sufficient. Effect of promise, &c., by one joint debtor.

What acknowledgment necessary.

When to third party *semble* must simply promise to pay the debt.

Stronger

the promise binding in law ; and this is believed to be the only instance in which a merely moral consideration is sufficient to support an express promise. This important consequence flows from the distinction here pointed out that in the case of acknowledgments the old liability is revived without any modification as to its amount or character ; whereas in the case of promises the new obligation will depend on the terms of the promise. Thus the promise may be to pay it *in futuro*, or by instalments, or on the happening of a condition ; which could not be the case if it were a revival of the old debt. The statute does not begin to run in such cases until the time has elapsed or the condition happened. Where a person promises to pay a barred debt when he is able, the statute begins to run from the time he so becomes able. (*Waters v. Earl of Thanet*, 2 Q. B. 757; *Hammond v. Smith*, 33 Beav. 452.) See an admirable exposition of the distinction here referred to, per Wigram, V.-C. *Phillips v. Phillips* (3 Harc. 281, 299.) And see *Tanner v. Smart* (6 B. & C. 603; and *Buckmaster v. Russell* (10 C. B. N. S. 745), where Williams, J., expressed his full concurrence with the views of Wigram, V.-C.

Evidence of promise or acknowledgment.—By the 9 Geo. 4, c. 14 (Lord Tenterden's Act), s. 1, "In actions of debt or upon the case grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of 21 Jac. 1, c. 16, unless such acknowledgment or promise shall be made or contained in some writing to be signed by the party chargeable thereby." By s. 8, such acknowledgments or promises need not be stamped. However, an unstamped promissory note cannot be used to show an acknowledgment, as it has been held that the section does not exempt such an instrument from its appropriate stamps. (*Jones v. Ryder*, 4 M. & W. 32; *Parmiter v. Parmiter*, 30 L. J. Ch. 508.) The 19 & 20 Viet. c. 97, s. 13, provides that written acknowledgments and promises signed by agents duly authorised, shall be binding within the foregoing provision.

The above section of 9 Geo. 4, c. 14, expressly provided that a promise or acknowledgment made pursuant thereto by one of several joint debtors, &c., should not deprive the other or others of the benefit of any statute of limitations.

By and to whom promise or acknowledgment must be made.—Assuming that the provisions of Lord Tenterden's Act are complied with, the question may often arise whether the promise or acknowledgment has been made by and to the proper person. An admission by a debtor in his statement of affairs will not take a debt out of the statute as against his trustee in bankruptcy. (*Ex parte Topping*, 34 L. J. Bkcy. 44.) A mere acknowledgment by an executor is not always sufficient, but it seems it would be otherwise if he expressly promised to pay. (*Tullock v. Dunn*, Ky. & M. 416; *Scholey v. Walton*, 12 M. & W. 510.) As to the effect of an acknowledgment by one joint maker of a promissory note, see *Pittam v. Foster*, 1 B. & C. 248.

There appears to be some uncertainty on the law as to whether and in what cases the promise or acknowledgment may be made to another person than the creditor. Both before and since the passing of Lord Tenterden's Act, acknowledgments to third persons were held to put cases out of the statutes of limitations. However, in the only case since the 9 Geo. 4, c. 14, the admission was made in an inventory in the Ecclesiastical Court, setting forth the debts of the deceased. It seems to be at present the prevailing opinion that an admission made to a stranger can only affect the operation of the Statute of Limitations, when it can be properly left to the jury as equivalent to or implying a promise to the plaintiff to pay the debt. (See *Everett v. Robertson*, 28 L. J. Q. B. 23; *Ex parte Topping*, 34 L. J. Bkcy. 44.)

As to the sufficiency of the acknowledgment, Pollock, C. B., intimated

in *Cornforth v. Smithard* (5 H. & N. 13; 29 L. J. Ex. 228), that stronger words would be necessary to revive a debt already barred than to keep alive a debt against which the statute was running. For instances in which the sufficiency of the promise has been discussed, see *Rackham v. Marriot*, 26 L. J. Ex. 315 (Ex. Ch.); *Cusnidy v. Firman*, Ir. Rep. 1 O. L. 9, Ex.; *Lee v. Wilmot*, L. R. 1 Ex. 364; *In re River Steamer Co.* L. R. 6 Ch. 822; *Chasemore v. Turner*, 45 L. J. 66 (Ex. Ch.); L. R. 10 Q. B. 500, *Quincey v. Sharpe*, 1 Ex. Div. 72, 45 L. J. Ex. 347; *Sheat v. Lindsay*, 2 Ex. Div. 314, 46 L. J. Ex. 249; and *Meyerhoff v. Froelich*, 3 C. P. Div. 333, 4 C. P. Div. 63, 48 L. J. C. P. 48.

evidence required to revive debt barred than to suspend statute.

Where a document is put in evidence in support of the reply of acknowledgment, it is for the Court to determine whether it amounts to a sufficient acknowledgment. So the question whether a promise is conditional or not is for the Court; but in those cases any evidence of extrinsic circumstances which may affect the construction is for the consideration of the jury. (*Routledge v. Ramsay*, 8 Ad. & E. 221.) The admission of a balance due and promise of payment, though denying the amount claimed, is sufficient to interrupt the statute as to the amount claimed. (*Sheat v. Lindsay*, 46 L. J. Ex. 249, 2 Ex. Div. 314.)

Court to determine whether a document amounts to acknowledgment.

An acknowledgment after action brought is insufficient. (*Bateman v. Pinder*, 3 Q. B. 574.)

The provision requiring acknowledgments to be in writing signed applies to cases of debt on simple contract alleged by way of set-off, and to which the Statute of Limitations (21 Jac. 1, c. 16) has been pleaded. (Sect. 4 of 9 Geo. 4, c. 14.)

The revival of liability by promise or acknowledgment is confined to cases of debt, and no similar effect is given to acknowledgment of liability for other breaches of contract not resulting in debt. (*Boydell v. Drummond*, 2 Camp. 157, 160.) Lord Tenterden's Act does not affect this doctrine. The doctrine is also inapplicable to actions for wrongs independent of contract. (*Hurst v. Parker*, 1 B. & Ald. 92; *Tanner v. Smart*, 6 B. & C. 603, 605.)

Revival by acknowledgment applies only to debts.

An infant may by acknowledgment renew a debt for necessities barred by the Statute of Limitations. (*Willins v. Smith*, 4 E. & B. 180.)

With regard to specialty debts, the 5th section of 3 & 4 Wm. 4, c. 42, provides that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such specialty or his agent, or by part payment or part satisfaction on account of any principal or interest, it shall be lawful for the person entitled to bring his action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment. This section only applies to money remaining unpaid and acknowledged to be due, and not to other claims for acts or omissions in breach of covenants. (*Blair v. Ormond*, 17 Q. B. 423.)

Revival of specialty debts, 3 & 4 Wm. 4, c. 42.

The acknowledgment under this statute need not necessarily import a promise to pay, and therefore, even if made to a stranger and not to the creditor, it seems it will be sufficient. (*Huccutt v. Bonser*, 3 Ex. 491, 500.)

It is to be remembered that the effect of 37 & 38 Vict. c. 57, s. 8, is to limit actions of covenant for mortgage moneys, as well as actions to recover the mortgaged hereditaments, to twelve years instead of twenty years. (*Sutton v. Sutton*, 22 Ch. Div. 511), although the debt be also secured by a collateral bond (*Farnside v. Flint*, 22 Ch. Div. 579).

Limitation of mortgage debts.

In replying to a plea of a statute of limitations, if the plaintiff relies on any of the disabilities before mentioned at the commencement of the action, he should distinctly state what the disability was, and when it ceased, so as to show that there was not sufficient time for the statutory bar to arise before the commencement of the action. Under the former

How disability pleaded in reply to defence of statute.

system of pleading, a plaintiff was required to reply specially in such circumstances. (*Chandler v. Villett*, 2 Wms. Saund. 118.)

Now necessary to reply specially where debt revived by promise.

When the debt by simple contract was revived by an absolute promise or acknowledgment it was formerly unnecessary to reply specially, as under an issue taken on the plea of the Statute of Limitations it was open to a plaintiff to show that the cause of action was renewed within six years. The ground of this was that a new cause of action was in strictness created by the promise or acknowledgment, and therefore a replication taking issue on the plea of the Statute of Limitations asserted in substance that the cause of action did accrue within the prescribed period. (*Tanner v. Smart*, 6 B. & C. 603, 606.) Under the present rules of pleading, such matter must be specifically stated in the reply.

Revival of specialty debt to be specially replied.

The 3 & 4 Wm. 4. c. 42. s. 5, which provides for the revival of specialty debts by acknowledgment, directed that the plaintiff might by way of replication state such acknowledgment, and that the action was brought within twenty years from such acknowledgment. It was held that the acknowledgment should be replied specially, and could not be given in evidence under a joinder of issue or replication that the cause of action accrued within twenty years before suit. (*Moodie v. Bannister*, 28 L. J. Ch. 881.) It was also held that the mode of making the acknowledgment, whether by writing, part payment, or part satisfaction, should be specifically stated in the replication. (*Forayth v. Bristow*, 8 Ex. 347.) A reply in accordance with these requirements would under the present rules of pleading be sufficient.

In the statement of claim in an action on such a debt, it is the specialty revived by acknowledgment, which should be set out as the foundation of the action, and not the writing or act by which it was revived.

Reply that cause of action fraudulently concealed is good.

A reply to a defence setting out that the debt was barred by a statute of limitations that the plaintiff did not know of the cause of action until after the period of limitation had elapsed would be demurrable. But it would be otherwise with a reply alleging that the cause of action was fraudulently concealed by the defendant. (*Guild v. Gibbs*, 9 Q. B. Div. 59, overruling *Hunter v. Gibbons*, 26 L. J. Ex. 1; and the *Imperial Gas Co. v. London Gas Co.*, 10 Ex. 39.)

Foreign statutes of limitation which bar the remedy and not the right have no application here. (*Harris v. Quine*, L. R. 4 Q. B. 653; *Alliance Bank of Simla v. Carey*, 5 C. P. Div. 429, 49 L. J. C. P. 781.)

The statute chiefly governing the limitation of action between mortgagor and mortgagee is the 37 & 38 Vict. c. 57. Cf. *Fearnside v. Flint*, 22 Ch. Div. 579.

But the mortgagee does not become absolute owner of the land until foreclosure decree, and therefore an action by him to recover the land brought within twelve years after foreclosure decree, but more than twenty years after the mortgage or any payment of principal or interest, or any acknowledgment, is not statute barred. (*Pugh v. Heath*, 7 App. Cas. 235, 51 L. J. H. L. 367.) The ancient rule that no lapse of time barred the right to redeem while the mortgagor held a portion of the mortgaged property is gone (*Kinsman v. House*, 17 Ch. Div. 104), and the twelve years' limit is not to be extended by reason of the disability of any person. (*Forster v. Patterson*, 17 Ch. Div. 132.)

Effect of administration suit.

As to the effect of an administration action keeping alive debts due by the deceased debtor to all his creditors, see the judgment of Jessel, M.R. (18 Ch. Div. 551), in *Re Greaves, Bray v. Topfield*.)

Maintenance (a).

Claim in an Action for Maintenance.

1. The plaintiff has suffered damage by the defendant unlawfully upholding and maintaining one A. B. in an action in the Queen's Bench Division of the High Court of Justice, which the said A. B. had brought against the plaintiff to recover a penalty of £500.

2. The defendant had no interest in the said action or in the recovery of the said penalty.

Particulars of damage :—

1880.	Penalty recovered against plaintiff	£500	0	0
July 1.	Costs of action paid to A. B.	131	0	0
Do.	Costs of action paid to the plaintiff's solicitor, Mr. C. D. of E.	180	0	0

The plaintiff claims £811.

Malicious Arrest (b).

1. Claim in an Action for Malicious Arrest.

1. The plaintiff has suffered damage by the defendant on the 5th May, 1880, falsely and maliciously and without any

(a) "It results, I conceive, from all these cases, that to bind oneself after the commencement of a suit to pay the expenses of another in that suit, more especially if that other be a person himself of no means, and the suit be one which he cannot bring, is still, as it always was, maintenance; and for such maintenance an action will lie." (*Per Coleridge, L.C.J.*, in *Bradlaugh v. Newdigate*, 11 Q. B. Div. 9.) But where there is a common interest between the maintainer of the action and the person maintained no action will lie, as when a master assists a servant in a litigation, or a landlord his tenant, one commoner a fellow commoner, or a rich man gives money to a poor man out of charity to maintain a right which he would otherwise lose. (*Ibid.*)

What is maintenance.

In this action the fact that plaintiff has been defeated in the litigation in question, and had to pay damages and costs, will not disentitle him from succeeding. On the contrary, it will increase the damages, which will be the damages or penalty he has had to pay, with all costs to which he has been put as between solicitor and client. (*Bradlaugh v. Newdigate, supra.*) See also on this subject *Pechell v. Watson*, 8 M. & W. 691; *Brackell v. Rorier*, 2 Bingham, N. C. 634; *Hutley v. Hutley*, L. R. 8 Q. B. 112; *Flight v. Leman*, 4 Q. B. 883, where it was held that merely to instigate a suit was not maintenance, though to support one already instigated might be.

Measure of damage.

(b) This action was once pretty frequent, but since the 32 & 33 Vict.

reasonable or probable cause, making an affidavit in an action then depending in the Queen's Bench Division wherein the now plaintiff was defendant, to the effect that the plaintiff was justly indebted to him in the sum of £100, that he intended to go abroad and leave England in order to avoid payment of the said debt, and that he the said plaintiff would be a material and necessary witness on the part of the defendant at the trial of the said action, and upon such false affidavit the plaintiff procured from the judge at Chambers an order for the arrest and imprisonment of the plaintiff for six months or until he gave bail.

When a person still liable to imprisonment for non-payment of money.

c. 62, s. 6, which abolished imprisonment for debt, it is of rare occurrence. Since that Act, however, a person may still, during the course of civil proceedings, be arrested in several cases; and in all these cases it is submitted that a person is liable in an action for a malicious arrest if he, acting maliciously and without reasonable and probable cause, sets the law in motion and procures the arrest of another. By s. 4 of the 32 & 33 Vict. c. 62, a person may be arrested—(1) who, being a trustee fails to pay over trust moneys ordered by the Court to be paid over; (2) who, being a solicitor fails to pay any costs which he has been directed personally to pay; (3) who, being a bankrupt has failed to pay any instalments of income to the trustee in his bankruptcy which by the order of the Court he has been directed to pay.

By sect. 5, any person who fails to pay any debt due from him in pursuance of any order or judgment, may be committed to prison for six weeks on proof that he has the means of payment.

Cases where arrest on *mesne* process legal.

By sect. 6 it is enacted—(a) if a plaintiff shall at any time before final judgment prove, by evidence on oath, to the satisfaction of a judge, that he has a cause of action against the defendant to the amount of £50 or upwards, and that there is probable cause for believing that the defendant is about to quit England, and that the absence of the defendant will materially prejudice the plaintiff in the prosecution of his action, then it shall be lawful for the judge to order the defendant to be arrested and imprisoned for a period not exceeding six months, unless he give security that he will not leave England without the leave of the Court; (b) where the plaintiff sues for a penalty other than a penalty in respect of any contract, it shall not be necessary for him to prove that the absence of the defendant will materially prejudice him in the prosecution of his action.

The foundation of the action for malicious arrest.

The foundation of the action for malicious arrest in one or other of these cases must be that the party obtaining the order for the arrest, and who is the defendant, has imposed on the judge by some false statement; and this false statement and the surrounding circumstances must be such as clearly to demonstrate that the defendant had no reasonable or probable cause for the step he took. It must also be averred and proved that the order of arrest has been rescinded, and that the proceedings have terminated in the plaintiff's favour; but this fact is not by any means conclusive to prove an absence of reasonable cause on the part of the defendant.

An action will lie for maliciously causing a ship to be arrested and detained under a false allegation that there was a good claim for necessaries against her. (*Redway v. McAndrew*, L. R. 9 Q. B. 74.)

2. The plaintiff was arrested under the said order and detained in prison for five days until the judge at Chambers made a further order directing his unconditional release.

The plaintiff claims £1000.

2. Claim in an Action for Maliciously Arresting and Detaining a Ship.

1. The plaintiff was and is the owner and possessed of a ship called the "D. of S."

2. The defendant, on the 10th of June, 1880, falsely and maliciously and without reasonable or probable cause, represented to the registrar of the Truro County Court that one G. H. then had a cause of action against the now plaintiff for necessities supplied for the use of the said ship, in respect of which the said G. H. was entitled to have the said ship arrested and detained, and by such representation he procured the registrar of the said Court to issue a warrant for her arrest.

3. The said ship was arrested and detained under the said warrant for a long time until all proceedings were determined in her favour, and the plaintiff has sustained damage thereby.

The plaintiff claims £500 damages.

Malicious Prosecution (a).

1. Claim in an Action for Malicious Prosecution.

The defendant maliciously and without reasonable and probable cause, preferred a charge of larceny against the plaintiff before a Justice of the Peace, causing the plaintiff to be sent for trial on the charge and imprisoned thereon, and prose-

(a) An action for malicious prosecution is given where a person acting maliciously, and without reasonable or probable cause, has preferred against another in a criminal court, or before a judicial officer, a charge which in the event has been decided to be false, but which during its pendency has inflicted some injury to the property, person, or reputation of the plaintiff. The plaintiff is put to proof of *five* things.

1st. A criminal charge must have been preferred before a judicial officer. Any act by which the criminal law is set in motion against another will not amount to a malicious prosecution. To give a man into the custody of a police constable on a charge of felony might be a false imprisonment; it would not be a malicious prosecution. "There can be no malicious prosecution until the parties come before a Court or a

A criminal charge must have been made.

cuted the plaintiff thereon at the Middlesex Quarter Sessions, where the plaintiff was acquitted.

- judicial officer." (*Per* Willes, J., in *Austin v. Dowling*, L. R. 5 C. P. 540, which see for the distinction between false imprisonment and malicious prosecution.)
- The criminal charge must have been dismissed.** 2nd. The charge must have been false in fact, and so determined by the proper criminal Court before which it came. It is not necessary that the first Court before which the charge came should have decided it in the plaintiff's favour. It is enough if a Court of Appeal has given a decision in his favour, so that the ultimate determination declares the falseness of the charge; but subject to this, a man may be perfectly innocent of a charge that has been made against him, and prepared with abundant evidence to prove the fact, yet if a judgment against him of a competent Court remains on record, he cannot proceed with his action for malicious prosecution. The reversal of any conviction made upon the charge is a condition precedent to his right to sue in all cases save one. It has been decided that a malicious exhibition of articles of the peace against another, (which is of course a species of prosecution,) supported by a false oath of threats having been used, may be made the foundation of an action for damages, although the accused person has been required to find sureties and been imprisoned for default, and the order of commitment has never been reversed. (*Steward v. Gromett*, 29 L. J. C. P. 170.) The reason of this exception from the general rule is that proceedings before justices in cases of the kind are generally *ex parte*, the accused has no means of controverting the charge, and the justices have little or no option to refuse to bind him over, when the person exhibiting the articles swears that he is in bodily fear.
- Or conviction quashed.** 3rd. The prosecution must be malicious, that is to say, instituted from any other motive than the simple desire of bringing to justice one whom you believe has committed a crime. (See *Stevens v. Midland Rail. Co.* 23 L. J. Ex. 328.) But "malice alone is not sufficient to found the action, because a person actuated by the plainest malice may nevertheless have a justifiable reason for a prosecution." (*Per* Tindal, C. J., in *Willans v. Taylor*, 6 Bing. 186.) Where, however, the judge rules (for it is his province to determine this, the facts being found by the jury) that there is no reasonable or probable cause for the prosecution, the jury may from that infer malice. (*Buist v. Gibbons*, 30 L. J. Exch. 75.)
- Exception.** 4th. The prosecution must have been without reasonable or probable cause. It is impossible to lay down any general rule as to what constitutes a want of reasonable or probable cause for a prosecution: but the facts of the particular case ought to be such as to satisfy a reasonable mind that the accuser had little or no ground for the proceeding but his desire to injure the accused, or that he acted in the matter recklessly and carelessly, not caring what mistake he might make, and forbearing to institute reasonable inquiries which would readily have removed any little suspicion that might attach to the accused. The question of whether the defendant took reasonable care to inform himself of the truth of the charge is a material consideration. (*Per* Brett, M. R., in *Abrath v. The North Eastern Rail. Co.*, 11 Q. B. Div. 450.) Evidence that the accuser did not himself believe in the charge which he made is cogent evidence that he had no reasonable or probable cause; but from the most express malice merely the want of probable cause cannot be implied. (*Turner v. Ambler*, 10 Q. B. 252.)
- Malice necessary.** 5th. The plaintiff must show that he has suffered either in person, reputation, or pocket. It is generally very easy to aver and prove sufficient damage to ground the action, for it is seldom that the charge
- Want of reasonable and probable cause.**
- What amounts to.**

Particulars of special damage:—

Messrs. L. & L.'s bill of costs . . . £65 0 0

Loss in business from January 1, 1883,

to February 18, 1883 . . . 100 0 0

The plaintiff claims £500.

Defence.

1. The defendant denies that he acted maliciously or without reasonable and probable cause.

2. The plaintiff was prior to the making of the said charge in the defendant's employment as his butler. A quantity of silver plate was missed by the defendant, and upon the plaintiff's box being searched a portion of it was found hidden away in it. The plaintiff offered no explanation, whereupon the defendant preferred the said charge against him.

Reply.

The plaintiff joins issue upon the statement of defence.

is not so scandalous as that the mere preferring of it is not some injury to the plaintiff's reputation, and it almost always happens that the plaintiff is put to some expense in defending himself from it, which he can allege in his statement of claim, and in respect of which he can recover.

At the trial of the action it is for the jury to find the *facts* on which the question of reasonable and probable cause depends, but when the facts have been found, it is for the judge to determine whether they constitute reasonable and probable cause for the prosecution. (*Lister v. Perryman*, L. R. 4 H. L. 521.) The question of malice or no malice is entirely for the jury.

In the recent case of *Abrath v. The North Eastern Rail. Co.* (11 Q. B. Div. 440), the law in regard to the burden of proof cast upon a plaintiff in an action of this kind was exhaustively discussed by the Court of Appeal. There it was held that in an action for malicious prosecution the burden of proof as to all the issues arising therein lies upon the plaintiff; and although the plaintiff proves that he was innocent of the charge laid against him, and although the judge, in order to enable himself to determine the issue of reasonable and probable cause, leaves subsidiary questions of fact to the jury, nevertheless the onus of proving the existence of such facts as tend to establish the want of reasonable and probable cause on the part of the defendant, rests upon the plaintiff.

In *Sterens v. The Midland Rail. Co.* (10 Exch. 352), Baron Alderson intimated that an action for malicious prosecution would not lie against a corporation because it could not be guilty of malice, but this view was not acted upon in other cases, and in *Edwards v. The Midland Rail. Co.* (6 Q. B. Div. 287), Fry, L. J., expressly decided that such an action would lie.

An action will lie for maliciously and without reasonable or probable cause presenting a winding-up petition against a trading company. (*The Quartz Hill, &c., Co. v. Eyre*, 11 Q. B. Div. 674.)

The judge to determine question of reasonable and probable damages.

Claim in an Action for Maliciously Swearing Articles of the Peace against the Plaintiff.

1. On the 15th of April, 1880, the defendant falsely and maliciously and without reasonable and probable cause, made information on oath before two justices of the peace for the borough of B. that the plaintiff had threatened to assault him and commit a breach of the peace, and that he was afraid that the plaintiff would do him some grievous bodily harm, and by means of such false information he induced the said justices to order that the plaintiff should enter into recognisances with sureties to keep the peace for six months or be imprisoned for the said period.

2. The plaintiff, who was unable to find sureties, was arrested and imprisoned for six months under the said order.

The plaintiff claims £250 damages.

Defence.

1. The defendant denies that in swearing the said information he acted maliciously and without reasonable and probable cause.

2. The plaintiff did threaten him as alleged, and the defendant was in fear that grievous bodily harm would be inflicted upon him by the plaintiff.

Market (a).

Claim for an Obstruction of a Market and for Tolls.

1. The plaintiffs are the owners of a certain market holden in the borough of P., on Thursdays and Saturdays in each week,

Owner of a market may claim damages or an injunction.

(a) Persons entitled to the franchise of a market by grant or by immemorial user from which a grant can be presumed may bring an action for its disturbance, and in a proper case they may get an injunction to restrain any interference with it. But the mere grant of a market does not of itself confer the right to prevent persons from selling on market days in their private houses, though within the town or manor where the market may be held (*Mayor of Macclesfield v. Chapman*, 12 M. & W. 18; *Mayor of Penryn v. Best*, 3 Exch. Div. 294), though even such a right as this may be acquired by immemorial enjoyment. (*Ibid.*) In *Card v. Ford* (2 Wms. Saunders, 6 ed. 172) it was held that a new market

for the buying and selling of flesh meat, together with tolls, stallages, and other profits to that market appertaining, and all persons selling flesh meat on Thursdays and Saturdays within the said borough ought of right to sell the same only on paying to the plaintiffs the said tolls, stallages, and other profits of the said market.

2. On Saturday, the 4th of December, 1875, and from that day on each Saturday until the commencement of this action, the defendant exposed for sale in a shop within the limits of the said borough flesh meat, and refused to pay the plaintiffs any of the said tolls, stallages, or other perquisites and profits of the said market, and thereby disturbed the plaintiffs' market.

The plaintiffs claim:—

- (1.) £100, damages for the disturbance of the said market.
- (2.) £1 for tolls.

Medical Man (a).

1. Claim by a Physician for his Fees.

The plaintiff's claim is for £50 for medical attendance upon the defendant and his family between the 1st of May, 1880, and the 3rd of August, 1881.

may be a nuisance, though it is holden on another day, and in *Elwes v. Payne* (12 Ch. Div. 408) the late Master of the Rolls held that a rival market on Monday was, *prima facie*, an injury to an ancient market held on Thursday. In the last case his lordship went so far as to grant an interlocutory injunction restraining the defendants from continuing to hold their market on Monday: but the Court of Appeal held that upon the defendant undertaking to keep an account of the profits he made, no injunction ought to be granted until the hearing of the action.

(a) At common law a physician could not maintain an action for his fees, not even for his travelling expenses (*Veitch v. Russell*, 3 Q. B. 928), unless there was a special contract, proved by unambiguous evidence and not by mere letters acknowledging a debt or an account in vague general terms. (*Ib.*, and *Attorney-General v. Royal College of Surgeons*, 30 L. J. Ch. 757.)

By the 21 & 22 Vict. c. 90, s. 31 (amended in some few particulars by 22 & 23 Vict. c. 21, and 23 Vict. c. 7), persons registered pursuant to these Acts are entitled to practise medicine or surgery, or both, according to their qualifications, in any part of the Queen's dominions, and to demand and recover in any Court of law, with full costs of suit, their reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied to

When injunction granted.

Statutory provisions allowing medical practitioners to recover fees.

Full particulars of the said claim were delivered before action brought.

The plaintiff claims £50.

their patients. By force of the words "according to their qualification," it has been held that where the plaintiff's qualification is to practise surgery only he cannot recover for attendance on a medical case, as he is not within the section and therefore is under the common law disability in this respect; and with regard to medicine supplied by him during such attendance, he is within the Apothecaries Act (55 Geo. 3, c. 194), s. 21, cited *infra*. (*Allison v. Haydon*, 4 Bing. 619; *Leman v. Fletcher*, L. R. 8 Q. B. 319.) He may, however, recover for medicines supplied as ancillary to a surgical case. (*Ib.*)

Under this section it has been held that a registered physician may maintain the action without proof of any express contract or implied understanding that he should be paid. (*Gibbon v. Studd*, 32 L. J. Ex. 182; 2 H. & C. 92.)

Medical practitioners must be registered under Act.

By sect. 32, as amended by 23 Vict. c. 7, no person shall be entitled to recover any charge in a Court of law for medical or surgical advice, and attendance, or for the performance of any operation or for medicine or other medical or surgical appliances which he shall have both prescribed and supplied, unless he shall prove at the trial that he is registered under the Act (21 & 22 Vict. c. 90).

Medical Register, how far evidence of registration.

By sect. 28, a copy of the Medical Register directed to be printed and published by the general council formed under the Act purporting to be so printed and published, shall be evidence that the persons therein specified are registered according to the Act; and the absence of the name of any person from such copy shall be evidence until the contrary appear that he is not so registered, provided in this case that a certified copy under the hand of the registrar of the General Council or of any branch council of the entry of the name on the general or local register shall be evidence of registration.

By sect. 55, the Act is not to affect the lawful occupation, trade, or business of chemists and druggists, and dentists, so far as selling, compounding, or dispensing medicines.

Provisions of 55 Geo. 3, c. 194, as to apothecaries.

With regard to apothecaries, the 55 Geo. 3, c. 194, s. 21, provides that no person shall be allowed to recover any charges claimed by him in a Court of law, unless he can prove at the trial that he has obtained a certificate from the Court of Examiners of the Apothecaries' Company.

The provisions of sect. 32 of the Medical Act (21 & 22 Vict. c. 90), above cited, are not confined in their application to actions against patients themselves, but extend to cases where a third person has guaranteed payment for medical attendance, or is primarily liable for it as supplied on his credit. (*Roscoe's Evidence*, Nisi Prius, 13th ed. 486.)

Registration must be proved though not disputed.

Defences.]—1st. Non-registration of plaintiff pursuant to the Medical Act, as amended. (See *ante*.) The practitioner must be qualified and registered at the time the services were rendered, and it is not enough that he is registered at the time of action brought. (*Leman v. Hawley*, L. R. 10 Q. B. 66.) It would seem that even if a defendant admits the allegation that plaintiff was duly qualified and registered, this does not dispense with the necessary proof of qualification (*i.e.* registration) on the trial, or deprive the defendant of the benefit of the plaintiff failing to prove it, as by the language of sect. 32 of 21 & 22 Vict. c. 90, registration is made a condition precedent to the plaintiff recovering. (*Wagstaffe v. Sharpe*, 3 M. & W. 521.)

Bye-law of College of

2nd. That by a bye-law of a College of Physicians, to which the plaintiff belongs, it was provided that no member or fellow thereof

Defence.

1. The defendant says that the plaintiff is a physician and a fellow of the Royal College of Physicians of London, and by the bye-laws of the said college he is forbidden to sue for any fees for medical attendance.

2. The plaintiff's charges herein are exorbitant and unreasonable.

Reply.

The plaintiff joins issue upon the statement of defence.

2. Claim by the Executrices of a Dentist to recover Charges for Supplying and Fitting Artificial Teeth.

1. The plaintiffs are the executrices of the last will of E. S., deceased, surgeon-dentist.

2. The said E. S. in his lifetime professionally attended the defendant, and supplied him with a set of artificial teeth, and a gold plate, for which his reasonable charge was £31.

The plaintiffs claim £31.

Defence.

1. The said E. S., deceased, agreed with the plaintiff that he would charge him for the materials of the said artificial teeth only, and that the cost to the defendant should in no event exceed £5.

should be entitled to sue for his fees, &c. It seems that the College of Physicians (London) has made a bye-law that no *fellows* of the College shall be entitled to sue. This, however, does not extend to *members*. This defence must be expressly stated in the statement of defence.

3rd. That the defendant had no benefit from the plaintiff's attendance, &c., in consequence of his want of skill. But if the practitioner has used due skill and diligence, he is entitled to claim remuneration, though he may not have effected a cure. If a surgical operation could have produced no useful result in any event, the surgeon cannot recover; but if an operation, which might have been useful, has failed to produce the desired effect, this does not disentitle him to remuneration for his services. (See *Hill v. Featherstonchaugh*, 7 Bing. 574.)

A medical practitioner is liable for injuries caused through want of due care and skill. But it is not enough to render him liable that he has shown a less degree of skill than other medical men may have shown, or a less degree of care than he himself might have bestowed; nor is it enough that he has himself acknowledged some degree of want of care; there must have been a want of competent skill and ordinary care, and to such a degree as to have led to a bad result.

Physicians against fellows, &c., suing.

No benefit, owing to plaintiff's want of skill.

Medical practitioners, when liable for want of skill and care.

MISREPRESENTATION.

2. The teeth which the said E. S. did supply were not properly fitted, and were made of bad material, and they became wholly worthless, and of no use to the defendant.

3. The defendant brings into Court the sum of £5, and says that the same is sufficient to satisfy the plaintiff's claim herein.

3. Claim by an Infant through her next Friend against the Surgeons of a Hospital for Negligence.

1. The plaintiff is an infant. The defendant A. B. is an operating surgeon to the N. E. Hospital for Children at H., and the defendant C. D. is house surgeon to the same hospital.

2. In the month of October, 1880, the plaintiff was a patient in the said hospital, where the defendants so negligently and unskilfully performed a surgical operation on the knee of the plaintiff, that she has sustained permanent bodily harm.

The plaintiff claims £100 damages.

Defence.

1. The defendants deny that they were guilty of any negligence or want of skill in the performance of the said operation.

2. The plaintiff has not sustained permanent bodily harm.

Misrepresentation (a).

1. Claim for a Fraudulent Representation as to the Quality of a Thing sold.

1. On the 1st of November, 1880, the defendant sold to the plaintiff a jewel for the sum of £100, which he paid.

The action
of deceit.

(a) "A false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is." (*Pasley v. Freeman*, 3 T. R. 51; 2 Smith's Leading Cases, 7th ed. 64.) For many years there was much doubt whether, in order to maintain this action, it was necessary to

2. The defendant at the time of the said sale represented to the plaintiff that the said jewel was a Bezoar stone, whereas

establish actual moral fraud on the part of the defendant. In *Cornfoot v. Fouke*, 6 M. & W. 358, the Court of Exchequer decided that an untrue representation, upon the faith of which an agreement was entered into to take a furnished house, must, in order to avoid the agreement, have not only been untrue, but actually false and fraudulent on the part of the person making it. On the other hand, the Queen's Bench, in *Fuller v. Wilson*, 3 Q. B. 58, decided in an action brought by a purchaser of a house against the vendor for misrepresentation as to the house being free from rates and taxes, that whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, that was sufficient. In a later case, however, of *Ormrod v. Ruth*, 14 M. & W. 651, in the Exchequer Chamber, it was held that an action of deceit was not maintainable without showing that the representation was false to the knowledge of the person making it, or that he acted fraudulently in making it. "And this must now be taken to be the settled and established law." (*Per* Williams, J., in *Jolliffe v. Baker*, 11 Q. B. Div. 270.)

There must be moral fraud.

But, "if a man affirms something as a positive fact, concerning which he has no knowledge whatever, knowing neither whether it is a fact or not, and does so intending to induce another person to act upon it as a fact and for his own benefit, regardless of whether the fact is so or not, then that is the strongest evidence of moral fraud." (*Ibid.*) See also *Taylor v. Ashton*, 11 M. & W. 415; *Thom v. Bigland*, 8 Exch. 725; *Jarrett v. Kennedy*, 6 C. B. 319.

What amounts to it.

In *Cornfoot v. Fouke* (*supra*), a misrepresentation was made by an agent, who thought he was telling the truth. His principal had such a knowledge of the facts as would have founded an action if he had made the misrepresentation. It was held that under the circumstances the principal was not liable. This case has been often doubted but never overruled. See the cases collected in Smith's Leading Cases, 7th ed. 64. In *Udell v. Atherton*, 7 H. & N. 172, a question arose as to the liability of innocent principals to an action of deceit for a fraudulent representation made by their agent, the principals having adopted the contract and received the price. It was held the principals were liable.

Fraud by agents.

In *Langridge v. Levy* (2 M. & W. 519; 4 M. & W. 337) Baron Parke pointed out that upon the principle of *Pasley v. Freeman*, though a mere naked falsehood was not enough to give a right of action, yet, if it was told with the intention that it should be acted on by the party injured and damage was produced, all the essentials of a cause of action existed. The decision in this case was that where the defendant fraudulently warranted a gun to have been made by Kock, and to be a good, safe, and sound gun, and sold it to the plaintiff's father for the use of himself and his sons, and one of the latter used it and was injured, the defendant was liable for the injury so caused. (See also *Longmeid v. Holliday*, 6 Exch. 761; *George v. Skirington*, L. R. 5 Ex. 1, and observations upon latter case in *Heaven v. Pender*, 51 L. J. Q. B. 465.) If a person represents that he is entitled to act for another as his agent, knowing that he has no such authority, and by such representation induces another to enter into a contract with him or to otherwise alter his position, he is liable to the latter in an action for deceit. (*Randell v. Trimen*, 18 C. B. 786.) On the other hand, if a person, without any fraud, represents he has authority when he has none, he may still be liable in an action, but such action will be founded not upon deceit, but upon an implied warranty of authority. (*Collen v. Wright*, 7 E. & B. 301; 26 L. J. Q. B. 147; *Simons v. Patchett*, 7 E. & B. 568; 26 L. J. Q. B. 195.)

Representations made with regard to the solvency of third persons are regulated by statute. By Lord Tenterden's Act (the 9 Geo. IV. c. 14) it

in fact it was not a Bezoar stone, as the defendant then well knew.

Representations as to solvency of third persons must be in writing.

is enacted that no action shall be maintained whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon, *unless such representation or assurance be made in writing, signed by the party to be charged therewith.* As to what representations are within the meaning of this section and must be made in writing, see *Lyde v. Barnard*, 1 M. & W. 101; *Swann v. Phillips*, 8 A. & E. 457. A corporation may be bound by a fraudulent misrepresentation made by its manager, at least when it takes some benefit by the fraud. (*Barwick v. The English Joint Stock Bank*, L. R. 2 Ex. 259; 36 L. J. Ex. 147.) But, as a rule, a false representation within the statute cannot be made by an agent. It must be made in writing by the defendant himself, and therefore when the manager of a bank, acting within the scope of his authority to answer the inquiries of customers as to the solvency of third persons, made a false and fraudulent representation in writing as to the financial position of such a person, it was held that, while the manager was personally responsible, his employers, the bank, did not share his liability. (*Swift v. Jewsbury*, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56.)

Fraudulent prospectuses.

False statements made in the prospectus of a company with the intention that they should be acted on, will, if so acted on, entitle a person acting on them to sue the authors of the statements for damage caused thereby (*Gerhard v. Bates*, 2 E. & B. 476; 22 L. J. Q. B. 364); but *non-disclosure of material facts*, though a ground for setting aside an allotment or purchase of shares, is not a ground for an action of deceit, or for proceedings in equity in the nature of such an action. (*Perk v. Gurney*, 43 L. J. Ch. 19; L. R. 6 E. and I. Appeals, 377.) It is, however, only the persons who actually signed or issued the prospectus or who were consenting to its issue that are liable for the mis-statements in it. And, therefore, where brokers had authority from the defendants, the directors of a company, to issue a prospectus, but no authority to introduce false statements into it, it was held that the defendants were not liable for the fraudulent representations which the brokers in fact made in it. (*Weir v. Bell*, 3 Exch. Div. 238, affirming the Q. B. at p. 32.) To the same effect is *Cargill v. Bower*, 10 Ch. Div. 302, where it was held that a director of a company is not liable for a fraud (such as the issue of a fraudulent prospectus) committed by his co-directors or by any other agent of the company, unless he has either expressly authorised or tacitly permitted its commission. The mere issue of a prospectus containing false statements does not give a right of action to every person who may chance to read it at any distance of time after its issue. There must be some connection between the defendants and the person who says he is deceived (*per* Lord Chelmsford and Lord Coleridge in *Perk v. Gurney*, *supra*), as in *Gerhard v. Bates*, *supra*, where the prospectus was actually delivered to the person who then bought shares on the faith of it, or where an allotment of shares is made by the defendants to some one who purchased them upon the strength of what he saw in the prospectus. "The office of a prospectus is to invite persons to become allottees, and, the allotment having been completed, such office is exhausted, and the liability to allottees does not follow the shares into the hands of subsequent transferees." (*Perk v. Gurney*, *supra*, overruling *Bedford v. Bagshaw*, 6 H. & N. 538; 29 L. J. Ex. 59, and *Bagshaw v. Seymour*, 18 C. B. 903; 29 L. J. Ex. 60.)

Liability of directors.

In an action for deceit, if it is proved that the plaintiff did not rely upon the false statement complained of, he cannot maintain an action,

The plaintiff claims :—

- (1) Repayment of the said sum of £100, and interest ; and,
- (2) Damages.

2. *Claim for Fraudulent Representation as to the Temper and Disposition of a Horse.*

1. On the 13th of May, 1880, the defendant represented to the plaintiff that a horse which he was then offering for sale was quiet to ride or drive, and free from all vice, and acting upon the faith of such representation, the plaintiff bought the said horse for £80.

2. The said horse was not quiet to ride or drive, and free from vice, as the defendant well knew, when he falsely represented as aforesaid, and the plaintiff has suffered damage.

The plaintiff claims :—

- (1) A return of the said sum of £80.
- (2) Damages.

and if a statement by which he says that he has been deceived is ambiguous, the plaintiff is bound to attach a meaning to it. (*Smith v. Chadwick*, 20 Ch. Div. (C. A.) 27.) If a statement, though untrue to the knowledge of the defendants, is so trivial that it could not have influenced the conduct of the plaintiff, it will not support an action of deceit. (*Ibid.*) A mis-statement of the valuation of the property of the company to the amount of £3,000 out of £301,000, was held in this case not to be a material mis-statement, and it was intimated that if the name of a person is improperly placed on the list of directors it must depend upon the circumstances of the case whether this amounts to a material misrepresentation. Where one person induces another to enter into an agreement with him by a material statement, which is untrue, it is no defence to an action to rescind the contract that the plaintiff had the means of discovering, and might with reasonable diligence have discovered, that it was untrue. (*Redgrave v. Hurd*, 20 Ch. D. 1 (C. A.).)

Plaintiff to recover must have relied on false statement.

By the 34th section of the Companies Act, 1867, it is enacted, "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company or otherwise ; and any prospectus or notice not specifying the same shall be deemed *fraudulent* on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." The promoters are liable in this action for omitting contracts from the prospectus, though they *bonâ fide* believed that it was not necessary to mention them. (*Twycross v. Grant*, 2 C. P. D. 469 ; 46 L. J. C. P. 636 ; *Bagnall v. Chorlton*, 6 Ch. Div. 371 ; 47 L. J. Ch. 30. See also in connection with this class of case, *The New Sombrero Phosphate Co. v. Erlanger*, 3 Appeal Cases, 1218 ; 48 L. J. Ch. 73 ; *Gover's Case*, L. R. 20 Eq. 114 ; 1 Ch. Div. 182.

Omission of contracts in prospectus gives cause of action.

3. *Claim for Misrepresentation as to the Extent of a Piece of Land sold.*

1. During negotiations between the plaintiff and the defendant for the purchase by the former of a close of land, called "Red Close," near Guildford, the defendant represented to the plaintiff that the said close of land was three acres in extent.

2. The plaintiff, acting upon the faith of such representation, contracted to purchase the said close of land for £150, £50 of which he paid before action brought.

3. The said close of land is not three acres in extent, or more than two acres, as the defendant well knew when he represented as aforesaid.

The plaintiff claims :—

(1) A return of the said sum of £50.

(2) A declaration that the said contract of sale is void, and that it may be set aside.

Defence and Counter-claim.

Defence.

1. The defendant did represent to the plaintiff that the said close of land was about three acres in extent, but he made the said statement *bonâ fide*, believing it to be true, and without any fraudulent intent.

2. The plaintiff did not act upon the defendant's said representation in making the said contract of purchase, but upon the advice of a competent land valuer, whom he employed for that purpose.

Counter-claim.

3. The defendant says that the plaintiff agreed to purchase the said close of land for the sum of £150, only £50 of which has been paid.

The defendant claims £100.

Reply.

1. The plaintiff joins issue upon the statement of defence.
2. As to the counter-claim he repeats all the allegations contained in his statement of claim.

Rejoinder.

The defendant joins issue on the reply.

4. Claim for Misrepresenting the Value of a Baker's Business on its Sale.

1. On the 20th of March, 1880, the defendant offered to the plaintiff for sale the lease, fixtures, fittings, goodwill, and stock-in-trade of a baker's shop and business then carried on by him at Dalston, and at the same time he represented that the said business was an increasing one and had for many months past been doing twelve sacks a week.

2. In reliance upon the said representations the plaintiff purchased the said business for £500, £200 of which he then paid.

3. The said business was not an increasing business, and it had never done twelve sacks a week, as the defendant well knew at the time when he so represented. By the matters aforesaid the plaintiff has suffered damage.

The plaintiff claims:

- (1) Repayment of the said sum of £200 and interest; and
- (2) £200 damages.

Defence and Counter-claim.

Defence.

1. The defendant represented that the said business had been doing six sacks a week and no more, and that it was an increasing business.

2. The said representations were true.

3. The plaintiff did not purchase the said business in reliance upon any representations made by the defendant. He examined the books and made his own inquiries from the defendant's customers, and acted upon the information he so obtained.

Counter-claim.

4. The defendant says that plaintiff purchased from him the lease, fixtures, fittings, goodwill, and stock-in-trade of the said shop mentioned in the statement of claim for the sum of £500.

5. The plaintiff has paid £200, and no more.

The defendant claims £300.

Reply.

1. The plaintiff joins issue upon the statement of defence.

2. As to the counter-claim he repeats all the allegations contained in the statement of claim.

Rejoinder.

The defendant joins issue upon the reply.

5. *Claim for Misrepresenting the Value of a Public-house on its Sale.*

The plaintiff has suffered damage from the defendant inducing the plaintiff to buy the goodwill and lease of the "George" public-house, Stepney, by fraudulently representing to the plaintiff that the takings of the said public-house were £40 a week, whereas in fact they were much less to the defendant's knowledge.

Particulars of special damage :—

[*Fill them in.*]

The plaintiff claims £——.

6. *Claim for Misrepresentation as to the Solvency of Another Person.*

1. In answer to a letter from the plaintiffs inquiring as to the solvency of A. B., the defendant on the 1st of August, 1879, replied as follows :—

"Gentlemen,—The person you inquire about is respectable

and doing a good business, and we consider his means are sufficient for his requirements in trade. Yours obediently,

"C. W."

2. At the time when the said reply was so sent by the defendant, the said A. B. was insolvent, as the defendant well knew.

3. In consequence of the said reply, the plaintiffs were induced to sell and deliver to the said A. B. goods on credit; and in the month of June, 1880, the said A. B. was indebted to the plaintiffs in respect of such goods in the sum of £818, no part of which the said A. B. has paid.

The plaintiffs claim £818, with interest thereon from — until payment.

7. Claim for Misrepresentation in the Prospectus of a Company.

1. On the 31st January, 1883, the defendant issued a prospectus to the public relating to the A. B. Company (Limited).

2. On Feb. 1st, 1883, the plaintiff received a copy of this prospectus.

3. The plaintiff subscribed for 100 shares in the Company on the faith of this prospectus.

4. The prospectus contained misrepresentations, of which the following are particulars:—

- (a) The prospectus stated . . . , whereas in fact . . . ;
- (b) The prospectus stated . . . , whereas in fact . . . ;
- (c) The prospectus stated . . . , whereas in fact

5. The defendant knew of the real facts as to the above particulars.

6. The following facts which were within the knowledge of the defendants, are material, and were not stated in the prospectus:—

- (a)
- (b)

7. The plaintiff has paid calls to the Company to the extent of £1,000.

The plaintiff claims:—

- (1) Repayment of £1,000 and interest;
- (2) Indemnity.

Defence.

1. The defendant did not issue the said prospectus to the public.
2. The defendant denies that the plaintiff subscribed for any shares in the said Company on the faith of the prospectus.
3. The said prospectus did not contain any misrepresentations. All the statements in the same specifically referred to in the 4th paragraph of the claim were true.
4. If any of them were untrue or inaccurate, the defendant did not know of their untruth or their inaccuracy.
5. The defendant does not admit that the facts alleged in the 6th paragraph were material.
6. They were not within the knowledge of the defendant.

8. Claim for Issuing a Fraudulent Prospectus within the 38th Section of the Act of 1867.

1. On the 13th of February, 1880, the defendants were the directors of a joint stock company called —.
2. On the said 13th of February they, as such directors, issued a prospectus to the public inviting persons to subscribe for shares in the said company.
3. On the 14th of the said February the plaintiff received a copy of the said prospectus.
4. The plaintiff subscribed for 50 shares in the said company upon the faith of the said prospectus.
5. The said prospectus did not specify the dates and names of the parties to the following contracts entered into by the defendants as directors of the said company before the issue of such prospectus, viz.:—
 - (a) A contract between one C. D. and the defendant A. B. of the 10th of January, 1880; and
 - (b) A contract between the defendants acting for and on behalf of the company and X. Y. dated the 11th of January, 1880.
6. The plaintiff has paid calls to the company to the extent of £600.

The plaintiff claims:—

- (1) A return of the said sum of £600;
- (2) Damages.

Mines.

(See *Landlord and Tenant*.)

Mischievous Animals.

(See *Ferocious Animals*.)

Money (a).

1. *Claim by Surety to Recover, against the Principal, Money he has been compelled to Pay.*

1. On the 3rd of May, 1879, the plaintiff, at the defendant's request, became surety to A. B. for the due payment by the defendant to the said A. B. of £50 on the 3rd of June, 1879.

(a) *Money paid by the plaintiff to the use of the defendant.*—To maintain this action the following conditions are essential, viz.—(a) That the money was paid by the plaintiff; (b) That it was paid at the request of the defendant. To support the first of these it is necessary to show that money was paid, unless where stock (*Howard v. Danbury*, 2 C. B. 803), or a bill or note (*Barclay v. Gooch*, 2 Esp. 571) is taken as equivalent to money. It must also be stated that the money paid was the plaintiff's. (See *Moore v. Pyrke*, 11 East, 52; *Exall v. Partridge*, 8 T. R. 308.)

A request must be proved, even where the plaintiff has paid a debt due by the defendant. (*Stokes v. Lewis*, 1 T. R. 20.) But a legal obligation to pay another's debt, as in the case of a surety, dispenses with an express request. (See *Johnson v. R. Mail Packet Co.*, L. R. 3 C. P. 38.) On this principle an accommodation acceptor who is sued in default of payment by the drawer may recover from the latter the amount of the bill paid by him (*Driver v. Burton*, 21 L. J. Q. B. 157); *aliter* if he paid it voluntarily. (*Sleigh v. Sleigh*, 5 Ex. 514.) If he defends the action at the request of the drawer, he may recover the costs. (*Garrard v. Cottrell*, 10 Q. B. 679.) And such request may be implied. (*Stratton v. Matthews*, 3 Ex. 48.)

Request must be proved, except where plaintiff compelled to pay.

Where the plaintiff paid the funeral expenses of the defendant's wife, who was living apart from him at her death, which took place in the plaintiff's house, he was held entitled to recover, though he knew where to find the defendant and did not apply to him. (*Bradshaw v. Beard*, 31 L. J. C. P. 273.)

When request implied.

If the plaintiff allows goods to remain on the defendant's premises with his knowledge but without his express request until rent has become due, and the landlord has distrained, the plaintiff cannot recover from the defendant money paid by him to pay out the distress.

An original lessee may recover in this action money paid by him for breaches of covenant by the assignee, on the implied or express promise or covenant to indemnify (*Moule v. Garrett*, L. R. 5 Ex. 132; *aff. Ex.* Lessee may recover money paid

2. The defendant did not pay the said sum of £50, and the plaintiff was compelled to pay it.

The plaintiff claims £50.

for
breaches
of cove-
nant by
assignee.

Ch. L. R. 7 Ex. 101. See also *Roberts v. Crowe*, L. R. 7 C. P. 636, per Willes, J.; and *Couch v. Tregennino*, L. R. 7 Ex. 88.) As to costs paid in action on such breaches, see *Howard v. Lucegrave*, L. R. 6 Ex. 43.

If a person is compelled to pay money in consequence of his own neglect or breach of duty, though it may be for the benefit of another, it cannot be recovered from the latter. (*Pitcher v. Bailey*, 8 East. 171.)

If there has been an express request to pay, the plaintiff may recover, though the debt was one which could not have been enforced, such as a wager (*Knight v. Chambers*, 24 L. J. C. P. 121; *Reed v. Anderson*, 10 Q. B. Div. 100), or a time bargain. (*Roscarne v. Bulling*, 33 L. J. C. P. 55.) A subsequent assent to the payment will be evidence of a previous request. (1 Wms. Saund, 264, b (2).)

Mere pay-
ment of
money not
evidence
of a loan.

Money lent.—The plaintiff must show that the money was lent and not repaid. The mere payment of money to the defendant is not evidence of a loan, as the presumption is that it was in payment of a debt. (*Welch v. Seaborn*, 1 Stark. 474.) But if the plaintiff can show any transactions from which the loan may be inferred, or an application for a loan at the time, this, coupled with payment, will be evidence of a loan. (*Cary v. Gerrish*, 4 Esp. 9.) Where money is advanced by A. to B. as a gift, B.'s assent will be assumed, but if B. declines to accept it except as a loan, the advance is then a loan. (*Hill v. Wilson*, L. R. 8 Ch. 888.) Where A., at the request of B., agreed to lend C. money on D.'s guarantee, and did so, receiving the following memorandum, signed by C. and D., "We jointly and severally owe you £60," it was held that there was evidence of a loan. (*Buck v. Hurst*, L. R. 1 C. P. 297.)

What is
evidence
of a loan.

Money had and received for plaintiff.—The plaintiff must show that money was received by the defendant, and that it was received by him on account of the plaintiff. This action will not lie to recover a bank note against the *finder* thereof, it not having been *received* (*Chitty on Bills*, 9th ed., 524); *aliter* if cashed. (*Ib.*)

An auctioneer is the agent of both parties, and a deposit on a sale that goes off may be recovered from him as money received to the plaintiff's use. Where a deposit is paid to the vendor's solicitor, the vendor may recover it before the question of title is settled. (*Edgell v. Day*, L. R. 1 C. P. 80.)

Profits made by an agent in the course of his employment belong absolutely to the principal, who may recover them as money received to the use of the plaintiff. (*Morison v. Thompson*, L. R. 9 Q. B. 480.)

Person to
whom mo-
ney is
paid for
another not
liable to
that other
till he has
agreed
with him
to hold the
money to
his use.
Money re-
coverable

Where an agent receives money to pay over to a third person, though he assents to hold it for that purpose, it cannot be recovered from him by such third person until he has entered into a binding agreement to hold it to his use or communicates the fact to the third person. (*Baron v. Husband*, 4 B. & Ad. 611; *Lilly v. Hays*, 5 Ad. & E. 548.) The holder of a bill cannot sue the acceptor's banker for the amount of the bill put into the banker's hands to pay the bill. (*Hill v. Royds*, L. R. 8 Eq. 290.)

In cases of a total failure of consideration this action lies to recover money paid on such consideration. But where A. conveyed land to B. and A. covenanted for title, and B. is evicted owing to A.'s want of title, A. cannot sue B. for money had and received, but can sue him on his covenant. (*Clare v. Lamb*, L. R. 10 C. P. 334.) If the consideration has only partially failed, the money cannot be recovered. As where a premium is paid for instructing an apprentice for seven years, and the master dies at the end of the first year, no part of the premium is re-

2. Claim for Funeral Expenses of Defendant's Wife.

1. The defendant's wife died in the plaintiff's house.
2. The plaintiff buried her in a manner suitable to her con-

coverable from the personal representative of the master. (*Whincup v. Hughes*, L. R. 6 C. P. 78.)

Money paid under mistake of law cannot be recovered back. (*Platt v. Bromage*, 24 L. J. Ex. 63; *Barber v. Pott*, 28 L. J. Ex. 381.) But money paid under a mistake of facts, which the party receiving has no claim in conscience to retain, can be recovered, though the plaintiff might have learned the real facts on inquiry. (*Milnes v. Duncan*, 6 B. & C. 671; *Lucas v. Worwick*, 1 M. & Rob. 293; *Kelly v. Solari*, 9 M. & W. 54.) It has been suggested that before commencing an action a notice of the mistake should be given to, and demand of the money made of, the defendant. (*Freeman v. Jeffries*, L. R. 4 Ex. 189.) If a person voluntarily waives all inquiry into the truth, or pays the money with a full knowledge of the facts, he cannot recover it. (*Kelly v. Solari*, *supra*; *Viner v. Hawkins*, 23 L. J. Ex. 38.)

Where bankers cash a customer's cheque, and afterwards discover that they have no assets of his, they cannot recover the money back from the person to whom they paid it. (*Chambers v. Miller*, 32 L. J. C. P. 30; *Pollard v. Bank of England*, L. R. 6 Q. B. 623.)

Money obtained by fraud may be recovered as money had and received, but it cannot be recovered after it passes into the hands of a person who takes it *bona fide* and for value. (*Watson v. Russell*, 34 L. J. Q. B. 93, Ex. Ch.)

A person who seeks to recover the amount paid on shares which he has been fraudulently induced to accept, must do so while he is in a position to put both parties *in statu quo*. He cannot do so if he has received dividends, and has permitted the company to be incorporated. (*Addie v. Western Bank of Scotland*, L. R. 1 H. L. Sc. 145, 165); but he may sue for damages for the fraud. (*Ib.*) If the allottee of shares has repudiated them on the ground of fraud, and his name has been removed from the registry, the sums paid on the shares may be recovered by him. (*Ship v. Crosskill*, L. R. 10 Eq. 73; *Askew's Case*, L. R. 9 Ch. 664.)

A person who involuntarily pays money, which he is not liable to pay, in order to recover possession of his property or prevent some injury being done to the plaintiff or his firm, may recover it back. (See *Kendall v. Wood*, L. R. 6 Ex. 243.) So where a party to a reference has been obliged to pay an exorbitant fee to take up the award (*Roberts v. Eberhardt*, 28 L. J. C. P. 74 Ex.), or where a public officer demands an excessive fee. (*Steele v. Williams*, 22 L. J. Ex. 225; *Dew v. Parsons*, 2 B. & A. 562.) So where a railway company refuses to deliver goods until payment of an unauthorised charge for carriage. (*Sutton v. G. W. Ry. Co.*, L. R. 4 H. L. 226; *Barendse v. L. & S. W. Ry. Co.*, L. R. 1 Ex. 137.) So if a sheriff obtain payment by wrongful seizure and threat to sell goods not liable to the execution. (*Valpy v. Manley*, 1 C. B. 594.)

Where a person pays money for the recovery of which an action is brought, even without prejudice, he cannot recover it, though the action was not well founded. (*Brown v. McKinally*, 1 Esp. 279.) So if the money has been regularly recovered under legal process. (*Hamlet v. Richardson*, 9 Bing. 644.) Even though recovered after judgment by a writ fraudulently issued to levy a sum already paid by the judgment debtor. (*De Medina v. Grove*, 10 Q. B. 152.) The remedy in the latter case is by motion to the Court to set aside the judgment.

on a total failure of consideration.

Money paid under mistake of law not recoverable.

Aliter, where mistake is as to facts.

Money obtained by fraud recoverable.

But the fraud, &c., must be at once repudiated.

Money extorted may be recovered.

Money obtained under legal process cannot be recovered.

dition in life, and necessarily spent the sum of £21 in so doing.

Particulars of the said sum of £21 have been delivered.

The plaintiff claims £21.

3. *Claim to Recover Money paid in Settlement of Bets.*

1. The defendant requested the plaintiff to attend the Ascot meeting and to back certain horses for sums not exceeding £150 in all.

2. The plaintiff attended the said meeting and backed the said horses, and the same losing, he paid to the winners of the bets the sum of £150.

Particulars :—

The plaintiff claims £150.

Defence.

1. The defendant authorised the plaintiff to back the said horses to the amount of £70 and no more.

2. The defendant brings into Court the said sum of £70, and says that it is sufficient to satisfy the plaintiff's claim herein.

4. *Claim for Money Lent.*

The plaintiff's claim is for the sum of £50 lent to the defendant on the 1st of January, 1880, on the terms that it was to be repaid whenever the plaintiff might demand it.

The plaintiff claims £50.

5. *Claim for Money Lent and Compound Interest.*

1. The plaintiff lent the defendant the sum of £100 on the 1st of January, 1880, on the terms that the defendant was to pay interest for the same after the rate of 10 per cent. per annum, with half-yearly rests, and that the same, with all interest then due, should be repaid on demand.

2. On the 13th of March, 1881, there was due to the defendant £100 principal and £15 for interest.

The plaintiff claims £115.

6. *Claim for Balance of Money Lent, Repayable by Instalments.*

1. On the 1st of March, 1881, the plaintiff lent the defendant £100, repayable in equal quarterly instalments of £25, beginning on the 1st of June, 1881.

2. The defendant duly paid the first three instalments, but has failed to pay the fourth.

The plaintiff claims £25.

7. *Claim for Money had and received by the Defendant for the Use of the Plaintiff.*

The plaintiff's claim is for money received by the defendant for the use of the plaintiff.

Particulars:—

1882.	To amount of rents, No. 5, Smith				
Jan. 1.	Street, collected by the defendant	£72	10	0	
	To deposit on intended sale of Eva				
	Villa.			100	0 0

The plaintiff claims £172 10s.

8. *Claim to Recover Illicit Profit made by an Agent.*

1. The plaintiff employed the defendant as his agent to purchase the S.S. "Queen" as cheaply as possible, and the latter, acting as the plaintiff's agent, purchased the said vessel for £5000.

2. The vendors of the said vessel, after the completion of the purchase and payment of the contract price, returned £250 of the same to the defendant by way of commission, and by virtue of an arrangement that he was to receive the said sum if the S.S. "Queen" was sold for £5000 to the plaintiff.

The plaintiff claims the said sum of £250.

9. *Claim to Recover Money deposited with Stakeholder to abide the event of a Wager.*

1. On the 10th of Sept., 1880, the plaintiff deposited with the defendant £25 to abide the event of a wager.

2. After the determination of the event, but before the

defendant had paid over the said sum to the winner, the plaintiff demanded it back.

The plaintiff claims £25.

10. *Claim for Money which Defendant received for the Plaintiff.*

1. On the 11th of May, 1879, A. B. paid £30 to the defendant for the use of the plaintiff, and the defendant agreed with A. B. to hold it for such purpose.

2. The defendant at the time communicated to the plaintiff the fact that he had received the said money, and held it for his use.

The plaintiff claims £30.

11. *Claim in Action to Recover Money obtained by Fraud.*

The plaintiff's claim is for £30 which, on the 15th of March, 1880, the defendant obtained from him by falsely representing that one A. B. had sent him to the plaintiff to borrow the said sum for the said A. B., whereas in fact the said A. B. had not sent the defendant to the plaintiff, as he well knew at the time.

The plaintiff claims £30.

12. *Claim to Recover Money Paid by Mistake and in Ignorance of Facts.*

1. The plaintiff's claim is to recover the sum of £10,000, being part of large sums consisting of many items which he paid to the defendants between October, 1877, and June, 1882, as their alleged charges for the conveyance of stone from Stockstead to various other stations on their line of railway.

2. The said sum of £10,000 was paid by the plaintiff by mistake and in ignorance of the fact that the said charges were overcharges as being in excess of the sums which the defendants could lawfully charge by their private Act of Parliament, and in excess of the charges made to other persons to whom the defendants rendered services of a similar kind.

The plaintiff claims:—

(1) £10,000; or

(2) That an account may be taken of all the sums which the

plaintiff has paid to the defendants in excess of the charges they might lawfully make between the months of October, 1877, and June, 1882; and that the defendants be ordered to pay such sums to the plaintiff.

13. *Claim to Recover Money extorted by Threats.*

The plaintiff's claim is to recover the sum of £50 which the defendant, on the 15th of November, 1880, extorted from the plaintiff by threatening to inflict grievous bodily harm upon him.

14. *Claim to Recover Money extorted by a Creditor in the course of Bankruptcy Proceedings (a).*

1. On the 10th of June, 1880, the plaintiff had filed a petition for the liquidation of his affairs by arrangement, and had offered his creditors a composition of 5s. in the pound.

2. The defendant was a large creditor, and the said composition could not be carried unless he voted for it. He refused to vote for the acceptance of the said composition unless the plaintiff paid him the sum of £50.

3. The plaintiff then paid him the sum of £50 for the said consideration and no other.

The plaintiff claims £50.

(a) In *Atkinson v. Denby* (7 H. & N. 934 ; 31 L. J. Exch. 362) it was decided by the Exchequer Chamber that where the plaintiff, being indebted to the defendant and others, offered a composition of 5s. in the pound, which the defendant refused to accept unless the plaintiff privately gave him £50, and the plaintiff did so, that the plaintiff could recover back the £50 as money paid under compulsion. It is quite clear that in such a case as the above the Court of Bankruptcy would on the application of any of the other creditors have set the composition proceedings aside.

Mortgages.

Action for Foreclosure or Sale.

1. The plaintiff is mortgagee of lands belonging to the defendant.

Rights of mortgagee.

2. The mortgagee has appointed a receiver of the rents and profits of the mortgaged estate for payment of the mortgage debt. The mortgagee is entitled to enforce his securities, but when that day, which is usually six months after the date of the deed, is come, and default has been made in payment, the mortgagee may enforce payment, and the mortgage may claim to redeem. It has been said that the rule that no man is to be vexed by a multiplicity of suits does not apply to mortgages, and there is authority for saying that after default in payment the mortgagee may enforce payment by all his legal and equitable remedies. He may sue the mortgagor upon the personal covenant; he may appoint a receiver of the rents and profits of the mortgaged estate, or ask the Court to make the appointment; he may bring appointment to recover possession of the mortgaged property, and he may sue for foreclosure. But it may well be doubted whether a mortgagee who was guilty of this proceeding, except in his own rights, would not be visited by the Court with the deprivation of his costs.

If the mortgagee should sue upon the covenant the action would have nothing peculiar about it, and judgment might generally be obtained under R. S. C. Order XIV. This course is, however, seldom taken.

Power of appointing receiver.

Large powers of appointing a receiver of the rents and profits of the mortgaged estate have been conferred upon mortgagees by the Conveyancing and Law of Property Act, 1881, ss. 19-25, thus obviating the necessity which previously existed of applying to the Court, but the process of liquidating through the intervention of a receiver, who is treated as the agent of the mortgagor and not of the mortgagee, is so rare that it is seldom resorted to except as auxiliary or supplemental to a foreclosure action.

There may be cases in which a mortgagee finds it desirable or necessary to enter upon or obtain possession of the mortgaged property, but such a course is open to the objection that for twelve years the mortgagee will have to keep accounts as mortgagee, not knowing whether he will be redeemed or not, and may after the lapse of time, when contradiction is difficult, be charged with "wilful default," while his prospects of being allowed for the cost of permanent improvements of the property are always doubtful.

Sometimes a mortgagee who desires to obtain payment of his debt transfers his debt and security to a third person, but this course is not advisable without the concurrence of the mortgagor, for, if that be wanting, there is some doubt as to the right of the mortgagee to charge the costs of the transfer of the mortgage against the mortgagor, and the mortgagor will not be bound by any statement of accounts arrived at behind his back by the mortgagee and the transferee.

Rights to an order for sale.

The usual practice is for a mortgagee who cannot obtain payment except by realising his security to proceed to foreclosure or sale. The Court has for some time had a limited power of ordering a sale of the mortgaged property in suits affecting mortgage securities, but the law in this respect has been revolutionised by the Conveyancing and Law of Property Act, 1881, s. 25 enacts:—

(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

2. The following are the particulars of the mortgage :—

(a) (Date) January 1, 1882. The plaintiff was the mortgagee, and the defendant the mortgagor.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants, or any of them.

Terms on which sale ordered.

(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this Act.

(7.) This section does not extend to Ireland.

The Court may exercise its power to direct a sale at any time before foreclosure absolute. (*Union Bank of London v. Ingram*, 20 Ch. Div. 463.) Of course the power of the Court to direct a sale does not, any more than a power of sale in the mortgage deed, affect the right of foreclosure (*Slade v. Rigg*, 3 Hare, 35); but unless the security is insufficient, and the mortgagor refuses to provide the expenses of a sale, the Court prefers sale to foreclosure.

Foreclosure has always been the right of the legal mortgagee. As to equitable mortgages, there has been some controversy, but the better opinion seems to have been that where the mortgage gave the mortgagee a right to call for a conveyance of the legal estate, he was entitled to foreclosure; but that where it merely created a charge or lien on the estate, his remedy was sale.

Right to foreclosure.

The Court does not decree foreclosure against the Crown, but usually directs a sale (*Reeve v. Att.-Gen.*, 2 Atk. 223; *Rogers v. Maule*, 1 M. & C. C. 4), and the rule is the same where the mortgagee's duty conflicts with his interest, as where he became executor to the mortgagor. (*Lucas v. Seale*, 2 Atk. 56.)

The practice in sales by the Court is now regulated by R. S. C. Order LI., rr. 1—6, by which it is enacted: If the decree for foreclosure is made, payment must be made of the amount found due by the chief clerk's certificate at the appointed day, together with subsequent interest and costs, otherwise the foreclosure will be made absolute. But there are many cases in which the time for payment has been enlarged where the day has been allowed to slip by owing to accident, mistake, or surprise (*Fisher on Mortgages*, p. 1055); and if, after the foreclosure has been made absolute, the mortgagee should sue the mortgagor upon his personal covenant, he will thereby "open the foreclosure," i. e., the mortgagor will then be entitled to redeem. (*Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317.) And upon the same principle, if the mortgagee should sell the foreclosed estate, he cannot afterwards sue the mortgagor upon his

- (b) (Sum secured) £500.
- (c) (Rate of interest) £5 per cent. per annum.
- (d) (Property subject to mortgage) Deep Dene Farm, in the parish of St. James, in the county of Middlesex.
- (e) (Amount now due) £572 10s.

personal covenant for any deficiency, because he could not, after the sale, restore the estate to the mortgagor if the latter should pay him his principal, interest, and costs. (*Lockhart v. Hardy*, 9 Beav. 349.) But it would be otherwise, we think, if the mortgagee had sold the estate, not as owner of a foreclosed estate, but as mortgagee under his power of sale. (Cf. *Rudge v. Dickens*, L. R. 8 C. P. 358.)

And a foreclosure will be opened if it has been obtained by perjury or fraud. (*Lloyd v. Manwell*, 2 P. Wms. 73.)

Where a sale is ordered, it is usual to give the conduct of it to the person most interested in selling well, i. e., the mortgagee when the security is insufficient, and the mortgagor when the security is ample.

Redemption suits.

It is not necessary here to state the history of the mortgagor's right to redeem the mortgaged estate on payment of what may be found due to the mortgagee for principal, interest, and costs, an offer to pay which was formerly essential to the plaintiff's bill, but is now no longer necessary, being implied. In a redemption suit the mortgagor cannot question the title which he has conferred upon the mortgagee, nor can the mortgagee deny the title of the mortgagor. He is, however, at liberty to show that the plaintiff is not in fact the successor in title of the mortgagor. Other common defences to the action are release of the equity of redemption, statute of limitations, and possession under a foreclosure decree binding on the plaintiff. Under the statute 4 & 5 Wm. & M. c. 16, it would be a good defence that the mortgagor concealed a prior mortgage when he mortgaged to the defendant, but the disposition of the Courts has been to construe this statute strictly. (*Kennard v. Fytroye*, 2 Giff. 81; *Stafford v. Selby*, 2 Vern. 589.)

It is a common stipulation in mortgage deeds that the mortgage money shall not be payable until a certain time has elapsed. By this means the right to redeem is suspended, but an agreement in the original mortgage deed that there should be no right of redemption would be void, as repugnant to the nature of a mortgage. (See Mr. Fisher's *Treatise on Mortgages*, p. 729, *et seq.*) The rule is "once a mortgage always a mortgage"; upon this principle equity disapproves attempts to limit the exercise of the right of redemption during the life of the mortgagor or of any one else. (*Newcomb v. Bonham*, 1 Vern. 8.)

Limitation of right to redeem.

The right to redeem will be gone after the mortgagee has held possession of the property for twelve years without any acknowledgment of the mortgagor's title (Real Prop. Limitation Act, 1874, s. 7), and the time will not be extended on the ground of the plaintiff's disability. (*Forster v. Patterson*, 17 Ch. Div. 104.) It is to be noted that the acknowledgment, in order to save the statute, must be given to the mortgagor, or to some person claiming his estate, or to his agent, and must be in writing.

In the case of a pledge, apart from the statutes relating to pawnbrokers, the right to redeem lasts throughout the pledgor's life and no longer. (*Ratcliff v. Ducies*, 1 Buls. 29.) The old rule that the right to redeem cannot be barred so long as the mortgagor holds possession of any part of the mortgaged premises no longer exists. (*Kinaman v. Rouer*, 17 Ch. Div. 97.)

As to the avoidance of unconscionable securities taken from expectant heirs, see *Nevill v. Stenning*, 15 Ch. Div. 679. The principle on which a Court of Equity has granted relief from an unconscionable bargain

3. The plaintiff took possession of the mortgaged property on the 31st day of December, 1882, and is ready to account as mortgagee in possession from that time.

The plaintiff claims payment, or, in default, sale, or foreclosure (and possession).

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entered into with an expectant heir or reversioner for the loan of money, applies also to the case of money being lent on unconscionable terms (not fully understood by the borrower, and known not to be fully understood by him by the lender), to a young man, being a minor at the time of the first transaction, the son of a father possessing large property, who has no property of his own, and no expectation of any except such general expectations as are founded on his father's position in life, the money being lent without any thought of repayment by the borrower, but on the credit of such general expectations, and in the hope of extorting payment from the father to avoid the exposure attendant on the son's being made a bankrupt. (*Ibid.*)

Unconscionable securities.

The principles upon which a mortgagee is entitled to consolidate his securities are explained in *Cummins v. Fletcher*, 14 Ch. Div. 699, and *Mills v. Jennings*, 6 App. Cas. 698.

Parties to redemption and foreclosure suits.—The general rule of the Court of Chancery was that all persons who had any interest either in the right to redeem or in the security should be joined. This rule is, however, subject to certain exceptions created by statute and the rules of Court.

Parties to suits relating to mortgages.

The mortgagor should always be joined, unless his estate has been completely divested, as by bankruptcy, in which case his trustee in bankruptcy occupies his place. If the mortgagor's estate has become vested in the Crown by forfeiture, the Attorney-General should be joined as representing the Crown.

Assignees of the equity of redemption, as stepping into the shoes of the mortgagor, should be joined as parties. If the equity of redemption has been settled, this peculiar rule has been established, that all the persons interested in the settlement need not be joined, but it is sufficient for the mortgagee claiming foreclosure to make the first tenant-in-tail, whom failing, the owner of the first estate of inheritance, whom failing, the first life tenant, defendant. (*Giffard v. Holt*, 1 Sch. & Lefroy, 408.) But where there are trustees of the settlement, the trustees sufficiently represent their *cestuis que trust*.

Any mortgagee claiming foreclosure or sale must make every subsequent incumbrancer and execution creditor a party. In practice it is found convenient to make prior incumbrancers parties also. (*Johnson v. Holdsworth*, 1 Sim. N. S. 109.)

Upon the principle that every person interested in the equity of redemption should be joined, it may, according to circumstances, become necessary for the mortgagee to join the trustees of the mortgagor's will, his heir, or devisee. The legal personal representative of the mortgagor is not generally a necessary party, but he would be if the mortgage were of a chattel interest, or if relief is claimed against the personal estate of the mortgagor. And if in a redemption suit it is charged that the mortgagee has been in possession, and is overpaid, the legal personal representative of the mortgagor is a proper party, for he has an interest in the amount of the over-payment. (*Duncombe v. Hansley*, 3 P. Wms. 333.)

Any person having any interest in the mortgaged property, as tenant for life, dowress, tenant by the curtesy, or execution creditor who has

Action Claiming Redemption.

1. The plaintiff is mortgagor of lands, of which the defendant is mortgagee.

2. The following are the particulars of the mortgage :—

(a) (Dated) June 1, 1882.

(b) (Sum secured) £1000.

(c) (Rate of interest) £5 per cent. per annum.

(d) (Property subject to mortgage) No. 1, High Street, Warwick.

[If the plaintiff's title is derivative, state shortly the deeds under which he claims.]

[If the defendant as mortgagee is in possession, add :]

3. The defendant has taken possession (or has received the rents) of the mortgaged property.

The plaintiff claims to redeem the said premises, and to have the same reconveyed to him [and to have possession thereof].

obtained the appointment of a receiver, may redeem. Since the Conveyancing and Law of Property Act, 1881, s. 35, which provides for the devolution of trust and mortgage estates on death to the legal personal representative, notwithstanding any testamentary disposition, it is no longer necessary to make the heir or devisee of the mortgagee a defendant. His legal personal representative alone can give a valid receipt and convey the mortgaged estate.

Rate of Interest.—If a mortgage deed should reserve a certain rate of interest, and provide that if it should not be punctually paid, a higher rate should become payable, the lower rate only would be allowed by the Court, the provision for the higher rate being in the nature of a penalty. If, however, the higher rate of interest should be reserved and a proviso added that a lower rate only should be payable in the event of punctual payment, the higher rate would be allowed if punctual payment were not made, and this will be so even although the mortgagee may have been in possession. (*Union Bank of London v. Ingram*, 20 Ch. Div. 463.)

A proviso that if one instalment of a debt payable by instalments should not be punctually paid, the whole debt should become immediately payable, is not a penalty. (*Wallingford v. Mutual Society*, 5 App. Cas. 685.) A judgment debt carries 4 per cent. interest, but a mortgage whose mortgage deed contains the usual covenant for interest payable at a higher rate may be confined to 4 per cent. by taking a judgment. (*Popple v. Sylvester*, 22 Ch. Div. 98, explained in *Ex p. Sneyd, Re Sneyd*, W. N. Dec. 8, 1883.)

Action by Assignee of Mortgagor for Redemption.

1. The plaintiff is assignee of a mortgagor of lands, of which the defendant is mortgagee.

2. The following are the particulars of the mortgage :—

(a) (Date) July 30, 1879.

(b) (Sum secured) £4000.

(c) (Rate of interest) £4 per cent.

(d) (Property subject to mortgage) the house No. 100, High Street, Berwick.

A. was the mortgagor. On Sept. 1, 1881, he assigned his equity of redemption to the plaintiff.

3. The defendant has taken possession (or has received the rents) of the mortgaged property.

The plaintiff claims to redeem the said premises, and to have the same reconveyed to him, and to have possession thereof.

Action for Raising Portions or other Charges on Land.

1. By a settlement on the marriage of A. B. and C. B., dated January 10, 1850, Whiteacre was demised to trustees for 1000 years on trust after the deaths of A. B. and C. B. to raise £5000 for the younger children of the marriage who should attain twenty-one.

2. A. B. died February 15, 1870.

3. C. B. died June 10, 1875.

4. There were five children only of the marriage of A. B. and C. B., all of whom are now living, and have attained twenty-one. The plaintiff is the second born child.

5. The defendants were on April 5, 1877, appointed trustees of the settlement.

The plaintiff claims :—

To have £5000 raised by sale or mortgage, and distributed among the persons entitled.

*Action by Dowress and Heir-at-Law of Mortgagor for Redemption
and Accounts on Footing of Wilful Default.*

Statement of Claim.

1. A. B. mortgaged lands to O. P., power to A. B. or his assigns to let the said lands being forbidden by the mortgage deed.
2. The following are the particulars of the mortgage :—
 - (a) Date: August 15, 1883.
 - (b) Sum secured £1000.
 - (c) Rate of interest: £5 per cent. per annum, reducible to £4 10s. per cent. per annum on punctual payment.
 - (d) Property subject to mortgage: the Martley Farm, in the parish of Allandine, in the county of Middlesex, containing 110 acres, or thereabouts.
3. By deed, dated August 15, 1883, A. B. conveyed his estate in the mortgaged property to C. D., subject to the mortgage.
4. C. D. died on September 1, 1883, intestate, leaving the plaintiff J. D. his widow, and the plaintiff K. D., his eldest son and heir-at-law, surviving him.
5. By deed, dated August 17, 1883, O. P. absolutely assigned the mortgage debt, and conveyed the mortgaged property to the defendant, subject to the equity of redemption.
6. The defendant on August 18, 1883, entered into possession of the mortgaged property, but he has not cultivated the same, and from neglect its value has been depreciated. The defendant has refused to let the mortgaged property, although an advantageous offer to rent the same was made to him by R. S.

The plaintiffs claim :—

- (1) Account of rents and profits which the defendant has received, or might have received, but for his wilful default.
- (2) Redemption of the said premises on the footing of the said account, and reconveyance to the plaintiffs, and possession of the premises.

Defence.

1. The defendant does not admit that A. B. ever conveyed his estate in the mortgaged property, or any part thereof, to C. D., subject to the mortgage or otherwise.

2. The defendant does not admit that C. D. died on Sept. 1, 1883, or is dead at all, or if dead, that he died intestate, or that the plaintiff J. D. is his widow, or the plaintiff K. D. his eldest son, or heir-at-law.

3. The defendant never entered into possession of the mortgaged property or any part thereof. Its value has not depreciated. No offer to rent the mortgaged property has ever been made to the defendant by R. S., or any other person, nor has the defendant ever refused to let it.

4. On June 16, 1884, no interest on the mortgage debt ever having been paid, the defendant appointed John Smith to be receiver of the rents and profits of the mortgaged property.

5. The said A. B. by deed, dated August 16, 1883, executed a second mortgage of the said mortgaged property to one V. W., to secure £500, and interest. The defendant submits that V. W. should be made a party to this action.

*Action by Assignee of Pawnor claiming to redeem against
Pawnee.*

1. A. B. is the pawnor of an oil painting, being a landscape by Nicolas Poussin, of which the defendant is pawnee.

2. The following are the particulars of the pawn :—

(a) (Date) July 30, 1882.

(b) (Sum received) £100.

(c) (Rate of interest) £10 per cent. per annum.

3. On December 30, 1882, A. B. assigned the painting, subject to the defendant's charge, to the plaintiff.

The plaintiff claims to redeem the said painting, and to have the same delivered to him.

Defence.

The defendant says that :

1. He is a licensed pawnbroker, and the pawn was made with him as such.

2. By the contract with A. B., which was a special contract in writing, it was agreed that the painting should not be redeemable after the 30th of January, 1883.

3. A. B. died on the 17th of May, 1883, before the commencement of this action.

4. On the 1st of June, 1883, the defendant sold the painting by public auction for £98.

5. The defendant does not admit that A. B. ever assigned to the plaintiff.

Action by Pawnee of Stock claiming a Sale.

1. The plaintiff is the mortgagee of stock belonging to the defendant.

2. The following are the particulars of the mortgage :—

(a) (Date) June 1, 1883.

(b) (Parties) the plaintiff and the defendant.

(c) (Sums received) £2000.

(d) (Property subject to mortgage) £1500 ; (nominal value) consolidated stock of the North Eastern Railway Company.

(e) (Amount now due) £1975.

3. The plaintiff received the July dividend, amounting to £105, on the said stock, and is ready to account for the same.

The plaintiff claims payment, or in default sale or foreclosure.

Defence.

The defendant says that :

1. By the mortgage contract it was agreed that the plaintiff should not require repayment of the loan of £2000 before June 1, 1884.

2. The defendant denies that £1975 is now due upon the security of the mortgage.

3. The plaintiff has received more than £105 by way of dividend. He has received a large issue of new stock as the holder of the stock mortgaged by the plaintiff.

Action by a Lender claiming Execution of a Legal Mortgage by the Borrower.

On June 1, 1883, the plaintiff lent the defendant the sum of £1000 upon the defendant's undertaking when required to

execute a legal mortgage of the Swanlee estate, near Aylesbury, in the county of Bucks, to secure the said sum and interest thereon, at the rate of £5 per cent., such sum not to be paid off for five years.

The plaintiff claims :—

- (1) A declaration that the said estate is charged with the repayment of £1000 and interest to the plaintiff.
- (2) Execution of a legal mortgage to the plaintiff.

Action by a Wife to redeem her Estate, mortgaged to secure her Husband's Debt, where the Equity of Redemption has been by mistake reserved to the Husband.

1. By deed, dated January 10, 1883, the plaintiff as surety mortgaged her estate at Wilton, in the county of Northumberland, held by her for her separate use, to the defendant A. B. to secure the payment of £5000 and interest to him by the defendant C. D. as principal debtor.

2. C. D. is the husband of the plaintiff.

3. By mistake the mortgage deed provided that on repayment of the mortgage debt the estate should be conveyed to the use of the defendant C. D. in fee simple, instead of to the use of the plaintiff in fee simple.

4. All moneys secured by the deed have been paid off.

The plaintiff claims a reconveyance of the said estate to her in fee simple.

Action for Sale and Distribution of Proceeds of Property subject to any Lien or Charge.

1. On November 12, 1880, A. and the defendant B. deposited with the plaintiff 500 Russian Government bonds as security for a debt of £1000 and interest at 4 per cent., due from A. and the defendant B. to the plaintiff.

2. A. died on March 12, 1881.

3. On March 30, 1881, administration of the estate of A. was granted to the defendant C.

4. £800, and £30 for interest, is owing to the plaintiff on the security of the said bonds.

The plaintiff claims :—

- (1) Sale of the said bonds.
- (2) Application of the proceeds in payment of his debt.
- (3) Distribution of the surplus among the parties entitled.

Negligence (a).

1. Claim by Plaintiff for Personal Injuries and Damage to Carriage.

1. The plaintiff has suffered damage from personal injuries to the plaintiff, and damages to his carriage, caused by the

Onus of proving negligence usually on the plaintiff.

(a) A person is liable for his or her own negligence, or for the negligence of a servant, causing actual injury or loss to another. But it is not enough that the plaintiff has been injured, and so injured by the act of the defendant. To found an action there must be negligence on the part of the defendant, directly bringing about the injury; and the onus of proving such negligence, except in a few cases where the law presumes it, lies on the plaintiff.

Injuries caused by mere accident not actionable.

Where the injury is the result of *mere accident*, no action lies; thus, where the coachman was driving in the middle of the road, and not on his own side, but there were no other coaches on the road, and the horses took fright and overturned the coach, this was held to afford no evidence of negligence (*Wakeman v. Robinson*, 1 Bing. 213); so where an injury was inflicted by a horse on which the defendant was riding, and there was no proof that he omitted to do anything in his power to prevent the accident, the plaintiff was nonsuited. (*Hammack v. White*, 11 C. B. N. S. 588; L. J. 31 C. P. 129; *Manzoni v. Douglas*, 50 L. J. Ch. 289; 6 C. P. Div. 145; *Tillett v. Ward*, 10 Q. B. Div. 17.)

Any negligence not enough.

Any act of negligence on the part of the defendant is insufficient. The negligence must in some way connect itself or be connected by evidence with the accident." (*Jackson v. The Metropolitan Ry. Co.*, 3 App. Cases, 193; 37 L. T. N. S. 670, per Lord Cairns.) "It is not sufficient to prove *some act* of negligence, unless it be proved that such negligence was the direct cause of the injury complained of." (*Ibid.*) The plea is referred to the case cited—*Jackson v. The Metropolitan Ry. Co.*—as the most recent and most authoritative exposition of the law on this subject.

When negligence may be inferred from the mere fact of the occurrence.

It has been said that the onus lies on the plaintiff of proving negligence; but the accident may take place under such circumstances as to be *prima facie* evidence of negligence, for the happening of something that would not happen if ordinary skill and care were used is evidence of negligence (*Gee v. Metropolitan Railway Co.*, L. R. 8 Q. B. 175, per Brett, J.), as where a collision takes place between two trains of the same company. (*Skinner v. L. & Brighton Ry. Co.*, 5 Exch. 787.) So proof that a stage-coach broke down raises a presumption that the accident arose either from the unskilfulness of the driver or the insufficiency of the coach. (*Christie v. Griggs*, 2 Camp. 79.) So, where B., walking in a street in front of the house of a flour-dealer, was injured by a barrel of flour falling upon him from an upper window, it was held that the mere fact of the accident was evidence to go to the jury in an action against the flour-dealer. (*Byrne v. Boadle*, L. J. 33 Ex. 13. See also *Scott v. London Dock Co.*, L. J. 34 Ex. 17, 220, Ex. Ch.; *Kearney v. L. Brighton, & S. C. Ry. Co.*, L. R. 6 Q. B. 759; *White v. France*, 2 C. P. Div. 306; 46 L. J. C. P. 823.) It is the absolute duty of an occupier of premises,

defendant or his servant on the 15th of January, 1882, negligently driving a cart and horse in Fleet Street.

2. Particulars of expenses :—

Charge of Mr. Smith, surgeon . . .	£10 10 0
Charge of Mr. Jones, coach-maker . . .	14 5 6
	£24 15 6

The plaintiff claims £150 damages.

having a lamp overhanging the footway to prevent its becoming dangerous to the public, and he cannot shift the liability arising from such duty from himself by having employed a competent person to repair it. (*Terry v. Ashton*, 1 Q. B. D. 314; 45 L. J. Q. B. 260.)

Although a person is liable for the act of a servant causing injury to another, such liability only exists where the negligence was committed at a time when the servant was going about his master's business, and acting, however injudiciously as it turns out in the event, as he thinks in the interest of his employer. It is long since the law was laid down that a master is not answerable for the wilful and malicious act of his servant. (*M. Manus v. Crickett*, 1 East, 106.) Thus, where the defendant's servant wantonly, and not for the purpose of executing his master's orders, strikes the plaintiff's horses, and thereby produces the accident, the master is not liable; but where the servant, in the course of his employment, and in order to extricate himself from a difficulty, so strikes them, although injudiciously, his master is liable. (*Croft v. Allam*, 4 B. & A. 590.) If the servant at the time of the accident is engaged on his own business, the master is not responsible, as in the case of *Storey v. Ashton*, L. R. 4 Q. B. 476. There the defendant's carman was directed to deliver the defendant's goods at a certain place, and the carman drove the defendant's cart with the goods in it in an opposite direction, in order that he might transact some business of his own, and it was held that the defendant was not liable for an injury done by the cart while it was being so driven by the carman. On the same principle, *Sterens v. Woodward*, 6 Q. B. Div. 318, was decided. But where a servant uses his own horse and gig on his master's business, and with his knowledge, the master is liable, though the servant may on the same occasion do business of his own. (*Patten v. Rea*, L. J. 26 C. P. 235.)

A master is not liable for the wilful and malicious act of servant.

Though a master is thus generally liable for the negligence of a servant, he is not liable for the negligence of another who contracts with him to do a lawful work. Here the contractor alone is liable, and not his employer; but this rule does not extend to protect one who is himself bound to do a particular work, and who engages another to do it for him, or one who orders work to be done which may be injurious to his neighbour. See on this subject, *Hughes v. Percival*, 8 App. Cases, 443, affirming the principle of *Bower v. Peate*, 1 Q. B. Div. 321. In the recent case of *Heaven v. Pender*, 11 Q. B. D. 503, the defendant, a dock owner, supplied and put up a staging outside a ship in his dock under a contract with the shipowner. The plaintiff was a workman employed by a ship-painter who had contracted to paint the ship, and while he was engaged in so doing, the staging, owing to the negligent way in which it had been constructed by the defendant, gave way, and the plaintiff was injured. It was held by the Court of Appeal, reversing the Queen's Bench, that the plaintiff could recover against the defendant. In such a case it is at his risk if the contractor neglect the work or do it in an improper manner.

Liability for contractors.

2. Claim by Plaintiff for Personal Injuries caused by Negligence of Defendant.

1. The plaintiff has suffered damage from personal injuries to the plaintiff, caused by a lamp, which the defendant negli-

An occupier of land adjoining a meadow where cattle are pastured, who grows a tree likely to be eaten by cattle, and poisonous if eaten, must keep it within his own boundaries; and if he does not do so, he is *prima facie* liable for the death of the cattle caused by their browsing on branches which project beyond his boundaries. (*Cr. whurst v. Burial Board of Amersham*, 4 Ex. Div. 5; 48 L. J. Ex. 109; *Firth v. Bowling Green Co.*, 3 C. P. Div. 254; 47 L. J. C. P. 358, distinguishing *Wilson v. Newberry*, 41 L. J. Q. B. 31.)

Occupier
prima facie
liable for
injury
caused by
dilapidated
premises.

The question has often arisen where an accident was caused by premises being out of repair, whether the landlord or the occupier is liable. It may be said that *prima facie* the latter is liable; but the landlord may also be responsible if it appears that he demised the premises in a dilapidated state, or that he was under a covenant with his tenant to do the very repairs, the want of which caused the mischief. The law on the point was discussed in the recent case of *Nelson v. The Liverpool Brewery Co.*, 2 C. P. Div. 311; 46 L. J. C. P. 675. There the plaintiff was injured by a chimney-pot accidentally falling upon him from a house in the occupation of a tenant to the defendants. The defendants were under no contract with their tenant to repair, and the premises were not out of repair at the time they let them. It was held that the defendants were not liable to the plaintiff for the injury he had sustained. And it was also intimated that this ruling would not be altered by a custom amongst landlords to do external repairs in the absence of any express provision in the agreement for letting, since such a custom would not create an obligation to repair for the neglect of which they could be sued by their tenants. "We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger, by the defective repair of premises let to a tenant, the occupier, and the occupier alone, being *prima facie* liable—first in the case of a contract by the landlord to do repairs where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition. In either of these cases we think an action would lie against the owner; see *Payne v. Rogers*, 2 H. Black. 349; *Todd v. Flight*, 9 Com. B. Rep., N. S., 377; S. C. 30 Law J. Rep. C. P. 21; *Russell v. Shenton*, 3 Q. B. Rep. 449; S. C. 11 Law J. Rep. Q. B. 289; and *Pretty v. Bickmore*, Law Rep. 8 C. P. 401." (*Per Lopes, J.*, in *Nelson v. The Liverpool Brewery Co.*, *supra*.)

When land-
lord liable.

It seems still open to doubt whether the relation between a cab proprietor and a cab driver is that of master and servant or bailor and bailee (see *Poncles v. Hider*, 6 E. & B. 207; *Venables v. Smith*, 2 Q. R. Div. 279; *King v. Spurr*, 8 Q. B. Div. 104); but it seems that the proprietor is liable to the driver if he do not take reasonable precautions to provide a horse fit for the purpose, and injury is thereby caused to the driver. (*Fowler v. Lock*, 43 L. J. C. P. 394.)

Negligence
of fellow-
servants.

Apart from a statutory liability to be presently mentioned, a master is not liable for injuries to a servant caused by the negligence of a fellow-servant in the same kind of employment (*Priestley v. Fowler*, 3 M. & W. 1); and on the same principle he is not liable to a stranger who volunteers his assistance to a servant. (*Jegg v. Midland Ry. Co.*, 1 H. & N. 773; L. J. 26 Ex. 171.) But where the consignee of goods assisted the servants of the railway company, and while so doing was injured by

gently kept outside his shop, overhanging the footway in Fleet Street, falling upon the plaintiff as he was passing along the said street.

2. Particulars of expense :—

Charges of Mr. Jones, surgeon . . . £20 0 0

The plaintiff claims £200 damages.

their negligence, held that the company were liable. (*Wright v. L. & W. N. Ry. Co.*, 1 Q. B. D. 152; 45 L. J. 570.) It must be carefully noted that it is not enough to free a master from liability that the servant injured and the servant causing the injury are both in his service; they must both be engaged in a common employment at the time of the accident; and in these cases there has frequently been a great dispute as to what constitutes a common employment. The pleader is referred for information on this head to *Vose v. Lancashire Ry. Co.*, L. J. 27 Ex. 249; *Waller v. S. E. Ry. Co.*, L. J. 32 Ex. 205; *Morgan v. Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149; *Larrel v. Howell*, 45 L. J. 387; *Swainson v. N. E. Ry. Co.*, 38 L. T. N. S. 201.

Servants must be engaged in a common employment.

Though not liable to a servant for the negligence of another servant, a master is liable to his servant for his own personal negligence, and also for the negligence of one who may be regarded as the vice-principal or representative of the master. (*Murphy v. Smith*, 19 C. B. N. S. 361.) In *Mellors v. Shaw*, L. J. 30 Q. B. 333, the plaintiff was injured by the negligence of one of two defendants, who was the manager of a mine, and personally superintended it. The Court decided that the other defendant was liable too. If the master fails to exercise due care and caution in the selection of his servants, and another servant is injured through the incompetency of one carelessly selected, the master is liable for personal negligence. (*Tarrant v. Webb*, 18 C. B. 787; L. J. 25 C. P. 261.) A master is bound to take reasonable precautions to secure the safety of his workmen. Thus if he provide bad timber for a scaffold (*Roberts v. Smith*, 2 H. & N. 213), or if he knowingly allow the servant to use an unsafe and unprotected machine (*Walling v. Oastler*, L. R. 6 Ex. 78), the master may be liable. It has been decided that a pilot whom a shipowner is compelled to employ, is not the servant of the shipowner so as to disentitle the pilot from recovering damages for an injury caused by the negligence of the crew. (*Smith v. Steele*, 44 L. J. Q. B. 60.)

A master liable to a servant for his personal negligence.

What constitutes personal negligence in a master.

Now, by the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), where any personal injury is caused to a workman by reason of any defect in the condition of the machinery, or by the negligence of any person employed by the defendant who had superintendence entrusted to him, or by reason of any person to whose orders the workman was obliged to conform, or by reason of any act done in obedience to bye-laws of the employment on which the workman was, or by reason of the negligence of anyone who has the charge or control of any signal, points, locomotive engine or train upon a railway—in such cases the workman, or when he is killed, his personal representative, shall have the same right of compensation against the employer "as if the workman had not been a workman or nor in the service of the employer, nor engaged in his work." (Sec. 1.) No workman, or his representative, can recover more than an equivalent to three years' wages. (Sec. 3.) He must give notice of the injury within six weeks, and such notice must be in writing (*Keen v. Millwall Dock Co.*, 8 Q. B. D. 482), though it need not be expressed in strictly technical language. (*Stone v. Hyde*, 9 Q. B. Div.

Employers' Liability Act, 1880.

3. *Claim against a Landlord for Personal Injuries caused to the Plaintiff by the Dilapidated State of the Demised Premises.*

1. In October, 1879, the defendant demised a house and shop in B. Street, Liverpool, to one A. B., in a dilapidated and ruinous state.

Employers'
Liability
Act, 1880.

76.) And the action must be brought within six months in case of accident, and in the event of death within twelve months of the death. (Sec. 4.) Every action under this Act must, in the first instance, be brought in the County Court, but there is a power under sec. 6 to move the proceedings into the High Court. In *Munday v. The Thames Ironworks & Shipbuilding Co.*, 10 Q. B. Div. 59, it was intimated that the power of removal ought only to be exercised in exceptional cases. In *Griffiths v. The Earl of Dudley*, 9 Q. B. Div. 357, it was decided that it is competent for a workman to contract with his employer not to claim compensation under the Act, and in that case if he is killed and his widow sues for damages under Lord Campbell's Act she will be non-suited.

Defences.

Contribu-
tory negli-
gence.

Contributory Negligence.—This is a very common and important defence. The law is now well settled that even though there has been negligence in the defendant, yet if the immediate and proximate cause of the injury was the unskilfulness or negligence of the plaintiff, he cannot recover. Thus, if a person were to cross a line of rail from one platform of a station to another, when another means of crossing was provided, and a train coming into the station at an unusual and improper speed were to run over and injure him, in such a case there would be negligence on the part of the railway company, but there would also be such contributory negligence in the plaintiff as would probably disentitle him from recovering. The rule preventing the plaintiff from recovering when he has been guilty of contributory negligence is, however, subject to this limitation, that if the defendant, by the exercise of ordinary care on his part, might have avoided the consequences of the plaintiff's negligence, and yet does not choose to exercise such care, the plaintiff may still recover. (See *Radley v. L. & N. W. Ry. Co.*, 1 App. Cases, 754; 46 L. J. H. L. 573.) This doctrine is well illustrated by the case of *Davies v. Mann* (10 M. & W. 546), known as the "Donkey case." Here the plaintiff had improperly left an ass with its forelegs tied together lying on the high-road. The defendant driving by, saw the donkey, and might easily, by the exercise of ordinary care, have passed by without injuring it, but instead of this he drove recklessly on and over the donkey; and for this act he was held liable in damages to its owner. It is plain here that there was contributory negligence in the plaintiff—the owner of the donkey; but it was an act of negligence the consequences of which the defendant might easily have avoided, and on that ground he was held responsible. After all, this rule with respect to contributory negligence and its limitation would seem to come to little more than the doctrine laid down, not for the first time, in *Jackson v. The Metropolitan Ry. Co.* (3 Appeal Cases, 193; 37 L. T. N. S. 679), that the defendant has a right to require proof that the negligence on which the plaintiff relies was the direct and immediate cause of the injury.

How far a
child can

The question has frequently arisen how far a child of tender years can

2. The plaintiff was passing down B. Street on the 17th of November, 1879, when, in consequence of the said condition of

be guilty of contributory negligence so as to disentitle it from recovering. In one case (*Lynch v. Nurdin*, 1 Q. B. 29) there seemed a disposition to decide generally that contributory negligence would not deprive a child of its right of action; but in *Abbott v. Macfie* and *Hughes v. Macfie* (L. J. 33 Ex. 177) the contrary was held. So in *Mangan v. Atterton* (L. R. 1 Ex. 239), and the law seems to be pretty well settled that contributory negligence may prevent a child from recovering, though probably an act which would be considered an act of contributory negligence on the part of an adult would not be so regarded in a child of tender years. The negligence of a person who has charge of a child will deprive the latter of any remedy for injury sustained. (*Waite v. N. E. Ry. Co.*, L. J. 27 Q. B. 417; in error, L. J. 28 Q. B. 258; *Burrell v. Hickinson*, 50 L. J. C. P. 101.) See also *Thorogood v. Bryan*, 8 C. B. 115, and *Armstrong v. L. & Y. Ry. Co.* (L. R. 10 Ex. 47), for a similar rule applied to the negligence of those to whom a grown-up person has confided himself.

At common law there was practically a defence where the negligence of the defendant killed its victim outright. If he were only mangled he had his remedy; but if he died his representatives could not generally sue, for to such a case the maxim *actio personalis moritur cum persona* applied. It is true that if the personal representatives could allege and prove that the personal estate of the deceased had been directly depreciated by his death, they might sue and recover. (See *Bradshaw v. L. & Y. Ry. Co.*, L. R. 10 C. P. 189.) And this right still remains to executors and administrators. In the vast majority of cases, however, there was no remedy for the more heart-rending cases where the breadwinner of the family had been suddenly cut off by the negligence of another.

In these circumstances the 9 & 10 Vict. c. 93 (known as Lord Campbell's Act) was enacted. It enables the personal representatives of the deceased to bring an action for the benefit of the wife, husband, parent (including in the term father, mother, grandfather, grandmother, stepfather, stepmother), or child (including in this term son, daughter, grandson, granddaughter, stepson, stepdaughter) of the deceased "whenever the death of a person is caused by any wrongful act, neglect or default which would (if death had not ensued) have entitled the party injured to an action." The jury can only give damages for actual pecuniary loss which the parties for whose benefit the action is brought have suffered; they can give no compensation for mental suffering or anguish, nor for funeral expenses. The essential ingredients in an action under the statute would seem to be: 1. Executor or administrator must bring the action within twelve months; or by 27 & 28 Vict. c. 95, s. 1, where there is no executor or administrator of the person killed, or there being such executor, &c., no action is brought within six months by him, the action may be brought by the persons beneficially interested in its result. 2. Action must be brought for the benefit of some one of the class of persons specified in the Act. 3. Negligence on the part of the defendant causing the death of the deceased. 4. Actual pecuniary loss to some one of the class of persons for whom the action is brought. In *Hetherington v. North Eastern Ry. Co.* (51 L. J. 495; 9 Q. B. D. 160), plaintiff sued to recover damages for the death of his son, and gave evidence to show that he (the plaintiff) was nearly blind, and that the deceased was very kind to him, and for some years past contributed to his support when he required it. It was held that there was evidence for the jury of a reasonable expectation of benefit from the continuance of the son's life entitling the plaintiff to sue. See also *Sykes v. The North Eastern Ry. Co.*, 44 L. J. C. P. 191; *Franklin v. The South Eastern Ry. Co.*, 3 H. & N. 211. It would seem

be guilty of contributory negligence.

At common law no remedy where person was killed by the negligence of another.

Provisions of Lord Campbell's Act.

Essential conditions to be satisfied when suing under this statute.

the premises, a slate fell from the roof of the defendant's said house and shop and inflicted personal injuries upon the plaintiff.

The plaintiff claims £100 damages.

Defence.

1. The defendant denies that the said premises were in a dilapidated and ruinous state when he demised them to A. B.

2. The plaintiff was not injured as alleged or at all.

4. Claim for Injury to Cattle owing to Negligent way in which Defendant kept his Land.

1. The defendant is the owner and occupier of a field contiguous to the plaintiff's field, and the defendant had in his field certain poisonous yew trees the branches of which he negligently allowed to project into the plaintiff's field.

2. On the 10th of May, 1880, two horses, the property of the plaintiff, were poisoned by eating the branches of the said yew trees.

The plaintiff claims £50.

Distinction between action under Lord Campbell's Act, and that for depreciation of personal injuries.

that the fact of the pecuniary loss need not be averred in the statement of claim. (*Chapman v. Rother* 1, L. J. 27 Q. B. 315.)

The action, which an executor or administrator may bring in respect of depreciation to the personal estate of the deceased, must be carefully distinguished from the action which executors or administrators may bring under Lord Campbell's Act (the 9 & 10 Vict. c. 39). The latter action is brought on behalf of a certain class of persons, the damages recovered are divided amongst them alone, and the general estate of the deceased is not at all benefited by it; whereas the damages recovered in the former action go to swell the personal estate of the deceased, and are distributed in due course of administration. It follows from this that recovery by personal representatives in one form of action is no bar to their suing again in the other form of action the very same defendant in respect of the same negligence. So that where a man has been killed by the negligence of another, his executors may possibly first of all recover damages against him for injury to the personal estate, and then recover damages for the pecuniary loss which his near relatives have sustained by his death. (*Leggett v. Great Northern Ry. Co.*, 1 Q. B. D. 599.) See also *Pulling v. The Great Eastern Ry. Co.*, 9 Q. B. D. 110.

In an action for injuries caused by defendant's negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages. (*Bradshaw v. Great Western Ry. Co.*, L. R. 10 Ex. 1.)

The Court will grant a new trial in an action for personal injuries on the ground of inadequacy of the damages where they are so small as to show that the jury must have omitted to take some elements of damage into account. (*Phillips v. The London & South-Western Ry. Co.*, 4 Q. B. Div. 406; 5 Q. B. Div. 78.)

Defence.

1. The defendant does not admit that the said horses were poisoned by eating the branches of the said yew-trees.

2. The branches of the said trees did not project into the plaintiff's field, and the defendant was guilty of no negligence in keeping them.

3. If the said horses did eat of the said branches they were trespassing at the time in the defendant's field, and the plaintiff was guilty of contributory negligence.

Reply.

The plaintiff joins issue upon the statement of defence.

5. Claim for Injury to the Plaintiff's Donkey which the Defendant drove over.

The plaintiff has suffered damage by the negligence of the defendant, who, on the 1st of January, 1880, was carelessly driving a horse and gig in K. Lane, Eltham, and then drove over and injured the plaintiff's donkey.

The plaintiff claims £15.

Defence.

There was contributory negligence on the part of the plaintiff, who had left the said donkey lying upon the carriage way in K. Lane with its legs tied together.

Reply.

The plaintiff says that there was ample room for the defendant to pass along the said lane without driving over the said donkey, and that if the plaintiff was guilty of any contributory negligence in leaving the donkey in the said lane, the defendant, by the exercise of ordinary care, might have avoided the consequences of the plaintiff's said negligence.

Rejoinder.

The defendant joins issue upon the reply.

6. *Claim by a Workman against his Employer for the Personal Negligence of the latter.*

1. On the 3rd of February, 1880, the plaintiff was employed by the defendant in the erection of a house at Ely.

2. The plaintiff has suffered damage by personal injuries to the plaintiff caused by the negligence of the defendant in providing rotten timber and rotten ropes for the scaffolding necessarily used in the building of the said house.

The plaintiff claims £150 damages.

7. *Claim by a Workman against his Employer under the Employers' Liability Act, 1880.*

1. The plaintiff was a guard in the employment of the defendant's company on the 2nd of March, 1881.

2. Owing to the negligence of the signalman in the defendant's service at D. Junction the train on which the plaintiff was travelling came into collision with a goods train, and the plaintiff suffered personal injuries.

3. The proceedings in this action were commenced in the D. County Court, and have been duly moved into this Court by certiorari.

The plaintiff claims £250 damages.

Defence.

1. The said collision was not caused by the negligence of the said signalman.

2. There was contributory negligence upon the part of the plaintiff.

3. Notice of injury was not given within six weeks.

4. This action was not commenced within six months from the occurrence of the accident causing the injury.

5. Prior to the plaintiff suffering the said injury he agreed with the defendant company that in consideration of an annual payment to be made by them to the M. Railway Benefit Society, in the event of his meeting with any accident in the course of his employment he would look to the funds of the said society for compensation, and would not take any pro-

ceedings against the defendants under the Employers' Liability Act of 1880.

Reply.

1. The plaintiff joins issue upon the statement of defence.
2. As to the 5th paragraph thereof he says that he was induced to enter into the said contract by the fraud of the defendant company, who represented to him [*here state the particular fraudulent statement complained of*].
3. The defendants have not paid to the said M. Railway Benefit Society the annual sum which was the consideration for the plaintiff's said promise.

Rejoinder.

The defendants join issue upon the reply.

8. *Claim by an Infant through her next friend for Personal Injuries caused by Leaving a Horse unattended.*

The plaintiff has suffered personal injuries by the negligence of the defendant's servant, who, on the 10th of June, 1879, left a horse and cart unattended in the streets of L., which drove over and injured the plaintiff.

The plaintiff claims £60 damages.

9. *Claim against Contractors and their Employer for negligently conducting Building Operations.*

1. The defendant A. B. is the owner of a house and land contiguous to the plaintiff's house, which is entitled to support from the defendant's said house and land. The defendant C. D. was, in the month of June, 1879, employed by the defendant A. B. to pull down and rebuild his said house.

2. In the course of so doing the defendant C. D. so negligently conducted himself in excavating the ground adjacent to the plaintiff's house, and in underpinning the same, that the plaintiff's house was damaged.

The plaintiff claims £500.

Defence of the Defendant A. B.

1. The plaintiff's house was not entitled to any right of support from the defendant's house and land.

2. The defendant C. D. was not guilty of negligence as alleged, or at all.

Defence of C. D.

1. The plaintiff's house was not entitled to any right of support from the defendant's land.

2. The defendant was not guilty of negligence as alleged, or at all.

10. *Claim for Negligence of Defendant's Servants, causing an Explosion.*

1. The plaintiff employed the defendant to do certain necessary repairs to the gas pipes in the plaintiff's house, 14, Wilton Crescent, Brighton.

2. The defendant's servants so negligently conducted themselves as to cause an explosion of the gas, and to do serious damage to the said house.

Particulars of damage :—[*Set them out.*]

The plaintiff claims £50.

11. *Claim for Negligence in leaving a Shaft Unfenced.*

The plaintiff has sustained personal injuries by the negligence of the defendant in leaving a shaft in the room C. of his sugar refinery at Bristol unfenced and without any protection, whereby the plaintiff, who was on the defendant's premises by his invitation, fell through it and broke both his legs.

The plaintiff claims £500 damages.

12. *Claim for Damage caused by a Collision between two Ships.*

The plaintiff has suffered damage from injuries to his ship the "Betsy," and the cargo on board thereof, by a collision with the ship the "Jane," caused by the negligent navigation thereof by the defendant or his servants on the river Thames, on the 1st of February, 1883.

Particulars of loss and expenses :—

1. Charges of Jones & Co., Shipwrights, £450 2s.

2. Loss of ship from 1st of February, 1883, to 1st of March, 1883, £280.

Particulars of damage to cargo :—

[*Insert them.*]

The plaintiff claims £——.

13. *Claim by Executor under Lord Campbell's Act for Death of Testator through Negligent Navigation of a Barge.*

The plaintiff, as the executor of A. B., deceased, brings this action for the benefit of C., the widow, and D. and E., the children of A. B., who have suffered damage by the defendant's negligence in navigating a barge on the river Mersey, on the 10th of May, 1881, whereby the said A. B. was drowned.

Particulars pursuant to the statute are delivered herewith.

The plaintiff claims £——.

Defence.

1. The defendant denies that he was negligent in the navigation of the said barge.

2. At the time of the said accident the deceased A. B. was on board a barge called the "G.," and there was contributory negligence upon the part of those in charge of the said barge.

3. The defendant does not admit that the persons for whom the plaintiff sues have sustained any pecuniary damage by the death of A. B.

14. *Claim by a Passenger against a Railway Company for Injuries suffered in a Collision.*

The plaintiff has suffered damage from the defendant's negligence in carrying the plaintiff as a passenger by railway from London to Brighton, causing personal injuries to the plaintiff in a collision near Hayward Heath, on the 15th January, 1882.

Particulars of expenses, &c.:—

Lost 15 weeks' salary as clerk at £2	
a week	£30 0 0
Dr. Smith's charges	10 10 0
Nurse for six weeks	3 0 0
	£43 10 0

The plaintiff claims £500.

Defence.

The defendants bring into Court the sum of £150, and say that the same is sufficient to satisfy the plaintiff's claim herein.

Reply.

The plaintiff joins issue upon the statement of defence.

15. Claim for Personal Injuries by Defendants' Train Overshooting the Platform.

1. On the 3rd of November, 1880, the plaintiff was being carried by the defendants on their railway from A. to B. as a passenger.

2. Owing to the negligence of the defendants' servants when the train arrived at B., it overshot the platform, and the plaintiff, in endeavouring to get out of the carriage, as he was invited to do by the defendants' servants, sustained personal injuries.

Particulars of expenses:—

[*Here insert them.*]

The plaintiff claims £250 damages.

Defence.

1. The defendants were not guilty of negligence as alleged or at all.

2. The plaintiff was not invited by the defendants' servants to get out of the carriage.

3. There was contributory negligence on the part of the plaintiff.

4. Before action brought the plaintiff accepted from the defendants £15 in full accord and satisfaction of the cause of action herein.

Reply.

1. The plaintiff joins issue upon the defence.

2. As to paragraph 4 thereof, it was expressly agreed when the plaintiff accepted the said sum of £15, that the same was not to be a full accord and satisfaction for the cause of action

herein if it should turn out that the plaintiff had contracted any spinal affection as a result of the said accident.

3. The plaintiff has sustained a spinal affection as the result of the said accident, viz., blindness.

Rejoinder.

The defendants join issue on the reply.

16. Claim against a Railway Company for Injury to Plaintiff owing to Defective Lighting of their Station.

The plaintiff has sustained personal injuries from the defendants' negligence in failing to have their N. Station properly lighted, whereby the plaintiff fell over a truck and broke his leg.

- Particulars of expenses :—

Dr. L.'s bill.	.	.	.	.	£20	0	0
Nurse, one month	.	.	.	.	3	0	0
					£23	0	0

The plaintiff claims £200.

Defence.

1. The N. Station was properly lighted at the time of the accident, and the defendants were guilty of no negligence.

2. The plaintiff was drunk when the accident occurred, and there was contributory negligence on his part.

17. Claim against a Railway Company for allowing their Fences to go down, whereby Plaintiff's Cattle were injured.

The plaintiff has suffered damage by the negligence of the defendants in allowing the fences which separate their line of railway from the plaintiff's fields at X. to get out of repair, whereby three cows, the property of the plaintiff, strayed on to the defendant's line, and were killed by a passing train on the 5th of October, 1880.

The plaintiff claims £60 damages.

Nuisance (c).

Nuisance by Statute.

The plaintiff has suffered damage from offensive and pestiferous smells and vapours caused by the defendant in the plaintiff's dwelling-house, No. 15, James Street, Durham.

Where
nuisance
inhabitable
plaintiff
must have
sustained
exceptional
damage.

Injury
through
defective
fencing by
or near
public path
or high-
way.

Rule as to
what con-
stitutes a
nuisance.
Decisions.

Distinction
between
nuisances
to property
and those

(c) Where the nuisance is a public one and indictable, an action will not lie at the suit of a private person, unless he sustains special damage beyond that sustained by the other persons affected by it. (*Ricket v. Mowbray*, 10 R. 1, L. R. 2 H. L. 175; *Wharfedale v. Lord Derby*, L. R. 2 Ex. 416; *Beehive v. North*, L. R. 9 C. P. 400; *McCarthy v. Metropolitan Board of Works*, L. R. 9 C. P. 191, Ex. Ch., and L. R. 7 H. L. 243.) Nor is a private person usually justified in starting a nuisance. (*Arnold v. Harris*, L. R. 5 Q. B. 96.) But see *R. v. Russell*, 2 Salk. 459, and *Jones v. Hayward*, 100 Car. 184.

Where the defendant built a house with an area which was left unfenced near a public footpath, and a person had fallen into the area while passing along the footway with ordinary care in the night, the defendant was held liable, though the plaintiff had accidentally deviated from the public footpath, and so inadvertently become a trespasser. (*Burns v. Wood*, 10 L. J. Q. B. 195; *Hadley v. Taylor*, L. R. 1 C. P. 53.) It would have been otherwise had the area been distant from the path. (*Id.*) And where a foot-passenger missed his way along a public path and strayed into a reserve it made by the defendants near to, but not substantially adjoining the path, they were held not to be liable, though the reserve and the reserve was dangerous, and that the foot-passenger had been ordinary care. (*Hardcastle v. South Yorkshire Ry. Co.*, 28 L. J. Ex. 139.) And when a way is dedicated to the public, they take it with all its existing facts. (*Fisher v. Prouse*, 31 L. J. Q. B. 213.)

It is enough to constitute a thing a nuisance that it renders the enjoyment of life and property uncomfortable. (*R. v. White*, 1 Burr. 337, per Lord Mansfield.) To erect anything offensive so near the house of another as to make it uninhabitable, such as a forge, is a nuisance. Com. Dig. Action on the case for Nuisance. (A. But *scilicet* the keeping of a kennel so near the plaintiff's house that the noise of the dogs prevented the family from sleeping at night and disturbed them by day, is not a nuisance—at least on a finding of a jury to this effect the Court refused to disturb the verdict; but the Court would in such a case have upheld the verdict had they found it a nuisance. (See *Crumph v. Lambert*, L. R. 3 Eq. 469.) Smoke or noise or offensive vapours may severally constitute a nuisance, although not injurious to health (*Ibid.*), or a neighbouring small-pox hospital. (*Hill v. Managers of Metrop. Asylums District*, 6 App. Cas. 193; *Ball v. Ray*, L. R. 8 Ch. 467.) It is a nuisance to display fireworks or other exhibition whereby disorderly crowds are collected near the plaintiff's house. (*Walker v. Brindley*, L. R. 5 Eq. 25; *Lushall v. Robinson*, L. R. 4 Ch. 388; Cf. *Broder v. Saillard*, 2 Ch. Div. 692.) But it is not actionable so to build as to obstruct the access of air to one's neighbour's chimneys. (*Bryant v. Lefever*, 4 C. P. D. 172.)

There is a distinction to be drawn between nuisances producing injury to property and those merely causing personal discomfort. The latter are not always actionable, as this would stop many useful trades; but if the nuisance causes a sensible injury to adjacent property it becomes actionable, as where vapours from a furnace injure the plaintiff's shrubs.

The plaintiff claims:—

- (1) £50;
- (2) An injunction to restrain the defendant from the continuance or repetition of the said injury or the committal of any injury of a like kind in respect of the same property.

(*St. Helen's Smelting Co. v. Tipping*, 35 L. J. Q. B. 66; and see *Silrin v. North Brancepath Coal Co.*, L. R. 9 Ch. 705. But see *Shotts' Iron Co. v. Inglis*, 7 App. Cas. 518.) With regard to personal discomfort it has been held that if the alleged nuisance, such as noise or smoke, interfere with the comfort of human existence in the plaintiff's premises, it is actionable. (*Crump v. Lambert*, *supra*.) It has, however, been well settled that merely diminishing the pleasure of the plaintiff in the enjoyment of his property is not actionable.

infringing on personal rights.

If the act of the defendant causes discomfort amounting to a nuisance, it is no defence that in creating it the defendant only made a reasonable use of his land and premises. Thus where the defendant erected a brick clamp on his land for the temporary purpose of burning bricks for building thereon, which clamp was 180 yards away from the plaintiff's house, but situated on the most distant part of the defendant's land, it was held that the erection constituted an actionable nuisance. (*Bamford v. Turnley*, 31 L. J. Q. B. 286, Ex. Ch. overruling *Hole v. Barlow*, 27 L. J. C. P. 207; and see *Carey v. Lidbetter*, 32 L. J. C. P. 104.)

No defence that defendant only made reasonable use of his property.

The question of nuisance frequently runs into that of negligence on the part of the defendant. Thus where a local board were empowered to erect in a navigable river a landing stage which was confined by anchors, the board was held liable for an injury to a ship by one of the anchors on the ground that the anchor was not marked by a buoy. (*Joliffe v. Wallasey Local Board*, L. R. 9 C. P. 62.) So where a gasfitter sent his servant the plaintiff to fix some gas apparatus in the defendant's sugar refinery at his request, and the plaintiff fell through an unfenced shaft in the refinery, the defendant was held liable for the injury caused by the fall. (*Indermaur v. Dames*, L. R. 2 C. P. 311, Ex. Ch.; and see *Woodley v. Metropolitan Ry. Co.*, L. R. 2 Ex. 384.) In the case of *Indermaur v. Dames*, the Court of Exchequer Chamber distinguished between cases where a person was on premises by mere permission (as to which see next paragraph) and where a person is on premises for lawful business in which plaintiff and defendant are interested, in which case the occupier of the premises is bound to use reasonable care to prevent damage from unusual danger which he knows or ought to know, and it is a question for the jury whether he has taken reasonable precaution, as by notice, lighting, guarding, &c., and also whether there was contributory negligence on the part of the plaintiff. (See "*Negligence*.") This doctrine seems to trench on the decision in *Seymour v. Maddox*, 20 L. J. Q. B. 327, where it was held that the owner of a theatre was not liable to an actor for injuries sustained by him by falling through an aperture on the stage which was not sufficiently lighted. The doctrine of *Indermaur v. Dames*, *supra*, was acted on in *White v. France*, 46 L. J. C. L. 823; 2 C. P. Div. 308.

Cases of nuisance and negligence frequently mixed up.

Distinction between cases where person on premises for business or by permission at time of injury.

A person being on or using premises by mere licence or permission, is in a different position from one using them, as in the case of *Indermaur v. Dames*, *supra*, in the course of business with the occupier. The result of the authorities on the subject is that in the case of mere licensees the occupier is not liable for damages caused by something defective or

Liability of occupier of dangerous premises to

Nuisance by Pollution of Water.

1. The plaintiff is the owner (or lessee) and occupier of a farm known as "Fairleigh," through which there runs a river known as "Fairleigh Bonnie Stream."

mere
licencees.

dangerous on the premises, unless it be in the nature of a trap. (*Bolch v. Smith*, 31 L. J. Ex. 201; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Castle v. Parker*, 18 L. T. N. S. 364 (1868); *Smith v. London and N. Katherine Docks' Co.*, L. R. 3 C. P. 326; *Corby v. Hill*, L. J. 27 C. P. 318.) It is on the principle involved in these cases that mere rioters cannot maintain an action through injuries sustained by reason of defects about the house. (See *Southcote v. Stanley*, 25 L. J. Ex. 339, and *Collis v. Selden*, L. R. 3 C. P. 495.) This exemption from liability where the injury arises from the negligence of a servant, has been put on the ground that the guest is in the same position as a servant with reference to the acts of the host's servants.

Rule that
occupier of
land liable
for nuisance
thereon
on much
modified.

It has been said that as a rule the occupier of fixed property is liable for any nuisance occurring on it (*Bush v. Steinman*, 1 B. & P. 404); but this rule is now subject to so many exceptions, that it would be dangerous to act on it as a general principle. It has recently been held that where the defendant has brought another person on land in his occupation, and allowed him to commit a nuisance thereon, he is liable for such nuisance. (*White v. Jameson*, L. R. 18 Eq. 303.) An occupier of land is not liable for a nuisance committed thereon by a stranger without his consent, if he has not subsequently approved of it. (See *Sarby v. Manchester & Sheffield Ry. Co.*, L. R. 4 C. P. 198.)

When
nuisance
created by
servants of
contractor.

The most important exception to the above rule is where nuisances are caused on land in a person's occupation by the malfeasance, misfeasance, or non-feasance of contractors' servants in the course of work they have undertaken. If a contractor employed to do a lawful act causes a nuisance in the course of his work, he and not the person employing him is liable for it. The same rule applies to cases of nuisance as to acts of negligence which may not come precisely within that category. The rule in both is that the wrongdoer himself or "the first person in the ascending line," who is the employer, must be looked to, but there the liability terminates, and the employer of such employer cannot be made liable. (*Murray v. Currie*, L. R. 6 C. P. 24. See *per Willes J.*, p. 27; *Pearson v. Cor*, 2 C. P. D. 369.) Where a contractor employed by navigation commissioners flooded the plaintiff's land by improperly and without authority introducing water into a drain insufficiently made by himself, the contractor and not the commissioners was held liable. (*Allen v. Hayward*, 7 Q. B. 960, 975.) And if a person employs a contractor to build on his land, and the workmen of the latter excavate the ground so negligently as to cause injury to a house on the adjoining land, the contractor and not the person who employs him is liable. (*Gayford v. Nicholls*, 23 L. J. Ex. 205.) The immediate employer of the person whose act causes the injury, whether he be the contractor or sub-contractor, or even the sub-sub-contractor, is the person liable. (*Knight v. For*, 5 Exch. 721; and see *Murray v. Currie*, *supra*.) The nature of the work raises a presumption that the person sought to be made responsible was an independent contractor, and not a servant. (*Welfarr v. London, Brighton, & South Coast Ry. Co.*, L. R. 4 Q. B. 693.) The principle laid down in these cases would not apply in the event of the employer of the contractor personally interfering or in any way making himself a party to the act or omission causing the injury. (*Burgess v.*

Immediate
employer
of person
causing
injury
liable.

Exceptions
to rule that
contractor
liable.



2. The defendant, or persons in his employ, pollute the water in the said river by passing into the same the refuse of the defendant's dye-works situate higher up the said river.

Grey, 1 C. B. 578.) Or where the thing ordered to be done or any part of it, as opposed to acts of negligence or nuisance in the doing of it, is itself a nuisance. (*Ellis v. Sheffield Gas Consumers' Co.*, 23 L. J. Q. B. 42.) Or where the employer is charged with a duty by statute, as he cannot shift his responsibility by employing a contractor. (See *Hole v. Sittlingbourne*, 30 L. J. Ex. 81.) This doctrine, however, seems hardly reconcilable with several cases. (See *Knight v. Fbr.*, and *Allen v. Hayward*, *supra*.)

A contractor lawfully employed to construct a sewer under a road is not liable for injury caused to a person through a hole having formed in the road by the natural subsidence of the ground, assuming that the contractor has properly completed the work. (*Ilyams v. Webster*, L. R. 4 Q. B. 138, Ex. Ch.) In such a case the employer of such contractor would not *seem* be liable.

The owner of land is as a general rule not liable for a nuisance erected or caused on it after letting it. If, however, he lets with a nuisance on it he continues liable for it (*Todd v. Flight*, 34 L. J. C. P. 31), but not if the nuisance is caused by a particular mode of using that which was on the land at the time of letting. (*Rich v. Basterfield*, 4 C. P. 783.) The landlord is liable for a nuisance arising from not doing repairs which as between himself and his tenant he was bound to do, or if he retains a control over the repairs. (*Payne v. Rogers*, 2 H. Bl. 349.) In one case A. let to B. a field for the purpose of its being worked as a lime quarry. The ordinary way of getting the limestone was by blasting, and A. authorised the quarrying of the stone and the erection of the lime-kilns in the field. A nuisance was caused to the adjoining occupier by the blasting and by the smoke from the kilns, and he brought an action against A. and B. On demurrer by A., it was held that he was liable, although the nuisance was actually created by the act of his tenant, because the terms of the demise were an authority from him to B. to create the nuisance, which was therefore the necessary consequence of the mode of occupation contemplated in the demise. (*Harris v. James*, 46 L. J. C. L. 545; distinguishing *Rich v. Basterfield*, *supra*.) Where the nuisance arises from non-repair, the landlord not being bound to repair, see *Nelson v. The Liverpool Brewery Co.*, 46 L. J. C. L. 675.

The proprietor of collected water is not liable without negligence for its escape caused by *vis major*; and a fall of rain of a kind which could not have reasonably been anticipated amounts to *vis major*. (*Nichols v. Marsland*, 44 L. J. Ex. 134; 46 L. J. (App.) 134 (C. L.)) It was held also in that case that the liability of the proprietor of stored water does not apply where a fresh agency intervenes between the water and the damage. (*Pletcher v. Rylands*, 3 H. L. C. 330; 37 L. J. Ex. 161, distinguishing. Compare *Dixon v. Metropolitan Board*, 7 Q. B. Div. 418.)

A public sanitary authority which does no act but merely allows a system of drainage to continue whereby a stream is polluted, is not liable to be sued for damages or an injunction. The remedy of any person aggrieved would seem to be by mandamus to compel the defendants to do their duty. (*Glossop v. Heston and Isleworth Local Board*, 12 Ch. Div. 102; *Attorney-General v. Dorking Guardians*, 20 Ch. Div. 595; and generally, see the Rivers Pollution Prevention Act, 1876.

If the plaintiff be entitled merely to a reversionary interest in the property affected by the nuisance, he must show that the nuisance affects

Contractor not liable, when.

Owner of land not liable for nuisance on it after letting.

Unless he is bound to repair or retain control over it.

Or unless nuisance the result of mode of occupation contemplated.

Proprietor of collected water not liable for escape of it by unusual rainfall.

Parties.

The plaintiff claims an injunction to restrain the defendant, his servants and agents, from sending from the said dye-works into the said river any matter so as to pollute the waters thereof, or to render them unwholesome or unfit for use, to the injury of the plaintiff [*or, as the case may be*].

The plaintiff will also claim damages in respect of the said nuisance.

Information by the Attorney-General on the Relation of the Plaintiff, and Action by the Plaintiff to restrain a Local Board from causing or permitting the Pollution of a Stream by Sewage so as to create a Nuisance (a).

1. Ever since the year 1879, the defendants, who are the sanitary authorities for the district of D., have caused and now cause the sewage of the said district to be carried into a natural watercourse called the "M.," which passes through the plaintiff's land at C., whereby a nuisance has arisen upon the plaintiff's land, and the health of the persons living upon the said land has been injuriously affected, and the plaintiff's land has been depreciated in value, and a serious nuisance is caused to the public.

2. The defendants have not provided any proper or sufficient system of drainage for the said district, and refuse to provide any, and threaten to continue to send the said sewage into the said watercourse.

The plaintiff claims an injunction to restrain the defendants from the continuance or repetition of the acts complained of.

Action for Injury to a Wharf, caused by improperly stacking Blocks of Granite against one of its Sides.

1. The plaintiff J. M., as the owner of the C. wharf, situate in P., in the county of Middlesex, and the plaintiffs, the L. P.

the value of his reversion, or that if not stopped the defendants will gain a prescriptive right. It avoids many difficulties to join the immediate tenant as co-plaintiff with the reversioner. (*Cooper v. Crabtree*, 19 Ch. Div. 193; 20 Ch. Div. 589.)

(a) The action and information is entitled "Her Majesty's Attorney-General on the relation of A. B. relator and plaintiff against C. D. and E. F. defendants," but the word "information" is not marked upon any pleading. (*A.-G. v. Shrewsbury*, W. N. 1880, p. 23.)

Co., as the lessees and occupiers of the wharf, have suffered damage from the defendants having stacked blocks of granite and heavy materials against the eastern side of the wharf and the plaintiff's buildings thereon.

2. By the defendants' said acts the said wall and buildings have been broken, crushed, and cracked, and the wharf has been rendered unfit for use, and the plaintiffs, the L. P. Co.'s, goods have been spoilt, and they have been compelled to hire another wharf.

Particulars of special damages to the plaintiff J. M.:—

1883.

Nov. 20. Paid Mr. S. for repairs to wharf £74 0 0

Particulars of special damages to the plaintiffs the L. P. Co.:—

Nov. 1,

1883. Injury to goods by falling wall . £39 10 0

„ Three months' hire of D. Wharf . 125 0 0

Total . £164 10 0

The plaintiff claims :

- (1) An injunction to restrain the defendants from the continuance or repetition of the said injury, or the committal of any injury of a like kind in respect of the same property ;
- (2) Damages, that is to say, £74 to the plaintiff J. M., and £164 10s. to the plaintiffs the L. P. Co.

Action for Injury to a Dwelling-house by sapping its Foundations (a).

1. The plaintiff is the owner of the house and premises called No. 100, Barnard Street, St. James's, Piccadilly.

2. In the month of October, 1883, the defendant dug out the foundations of an intended building on the east side adjoining the plaintiff's house, but so negligently and without shoring up the plaintiff's walls, that the foundations and walls of the plaintiff's house sank and gave way, and the plaintiff's house was damaged.

(a) See *Dalton v. Angus*, 6 App. Cas. 740, and *Rigby v. Bennett*, 21 Ch. Div. 559.

3. In consequence thereof the Metropolitan Board of Works lawfully required the plaintiff to repair his house and premises, and he was compelled to do so, and did so at a cost of £315, and the plaintiff for six months was unable to occupy his said house and premises.

The plaintiff claims :—

- (1) £400 damages ;
- (2) An injunction to restrain the defendant from the continuance or repetition of the said injury, or the committal of any injury of a like kind in respect of the same property.

*Nuisance on a Highway, causing Damage to the Plaintiff's
Coach and Horses.*

1. The plaintiff has suffered damage from the defendant having, on the 14th of October, 1883, deposited in the Edgware Road, in the county of Middlesex, a large quantity of sand and ballast, so as to obstruct the public highway there.

2. On the said day the plaintiff's coach and horses when lawfully proceeding along the said highway came into collision with the said obstruction, and were thereby overturned and injured.

Particulars of special damage :—

1883.

Oct. 17.	Paid Mr. S. for repairs to coach	£25	0	0
„	Paid Mr. T., veterinary surgeon, for attending horses		7	7
			0	0
	Total	£32	7	0

The plaintiff claims £—— damages.

Defence.

The defendant says that :—

1. The defendant deposited the ballast and sand in the proper performance of his duty to repair the Edgware Road, having contracted to do so with the Vestry of —.

2. He properly fenced and lighted the said ballast and

sand, and they were so lighted and fenced at the time of the accident.

8. The plaintiff, or his coachman, was guilty of contributory negligence.

Obstructing a Footpath, by means of which Damage was caused to the Plaintiff.

1. On the 17th of November, 1883, the defendant placed and kept a rope across the pavement of the public highway called South Street, Reigate, in the county of Surrey, obstructing the said highway.

2. On that date the plaintiff, who was then lawfully passing along the highway, was tripped up by the rope, and fell and broke his right arm, and was otherwise injured.

Particulars of special damage:—

1883.	Paid Dr. Smith for medical atten-			
Nov. 17	dance	£12	0	0
to —	Paid Mrs. Jones for nursing	5	0	0
188—.	Paid for medicine	1	0	0
Total		£18	0	0

The plaintiff claims £118 damages.

Defence.

The defendant says that:—

1. The rope was only placed across a part of the pavement in order to secure a ladder then being lawfully and necessarily used for the purpose of repairing a house, No. 100, South Street.

2. The plaintiff was guilty of contributory negligence. The defendant's workman warned the plaintiff to beware of the rope. The plaintiff was intoxicated at the time of the accident.

Damage caused to a Neighbour by Defective Drains (a).

The plaintiff has suffered damage from offensive and pestilential water and sewage which has flowed or percolated into

(a) See *Humphries v. Cousins*, 2 C. P. D. 239.

the plaintiff's house, No. 100, North Street, Epsom, in the county of Surrey, from the defendant's house, No. 101, North Street aforesaid, by reason of the defendant having neglected to repair his drains.

The plaintiff claims :—

- (1) £100 ;
- (2) An injunction to restrain the defendant from the continuance or repetition of the said injury, or the committal of any injury of a like kind, in respect of the same property.

Nuisance caused by Defendants placing Soil against a Wall adjoining Plaintiff's House (a).

The plaintiff has suffered damage from the defendants having placed large quantities of earth and refuse against a wall adjoining the plaintiff's house, No. 100, East Street, Leeds, in the county of York, whereby the surface of the defendants' land was raised above the level of the surface of the plaintiff's land and premises, and the rain which fell upon the said earth and refuse oozed and percolated through the wall, and made the plaintiff's house damp and unwholesome.

The plaintiff claims :

- (1) £200 damages ;
- (2) An injunction to restrain the continuance or repetition of the said injury, or the committal of any injury of a like kind in respect of the same property.

Nuisance by a Smallpox Hospital.

1. The plaintiff, as the owner and occupier of Highclose House, in the parish of A., in the county of B., has suffered damages by the acts of the defendants.

2. These acts are the building and keeping of a large house as a smallpox hospital on land contiguous to the plaintiff's house, whereby the plaintiff's servants have been infected by smallpox, and the plaintiff's house depreciated in value.

(a) See *Hardman v. North-Eastern Ry. Co.*, 3 C. P. Div. 168 ; 38 L. T. 339.

The plaintiff claims :—

- (1) £1000 damages;
- (2) An injunction to restrain the continuance or repetition of the said injury, or the committal of any injury of a like kind, or the use of the premises as an hospital, so as to be a nuisance to the plaintiff.

Action for Nuisance caused by burning Bricks, and by Noises from Steam Hammer.

1. The plaintiff A. B., as the owner of the house called Wilton Villa, Warminster Road, Cheltenham, and the plaintiff C. D., as the tenant and occupier of the said house, have suffered damage from the acts of the defendants.

2. The acts of the defendants complained of are: (a) the burning of bricks on the defendants' land adjoining the said house; and (b) the working of a noisy steam hammer on the defendants' said land.

The plaintiffs claim :—

- (1) £100 damages;
- (2) An injunction to restrain the defendants from the continuance or repetition of the said injury, or the committal of any injury of a like kind in respect of the same property.

Defence.

The defendants say that :—

1. The defendants have burnt bricks and worked their steam hammer on their said land in the same manner as at present as of right without interruption for the last thirty years.

2. The plaintiff's house was built 25 years ago. Since that time the plaintiffs have acquiesced in the burning of bricks and the working of the steam hammer by the defendants, and the defendants have incurred great expenditure upon the faith of the plaintiff's acquiescence.

Action to restrain the Use of Land as a Rifle Range.

1. The plaintiffs are the owners and managers of the West Warwick Hospital at —, in the county of —.

2. The plaintiffs have suffered damage by loud noises and alarms caused by the defendants using the land adjoining the said hospital on the north side as a rifle range for the discharge of firearms, whereby the patients and inmates of the plaintiffs' hospital have been alarmed and disturbed, and the access to the said hospital has been rendered dangerous.

The plaintiffs claim an injunction to restrain the defendants from using the said land as a range, or otherwise for the discharge of firearms there, so as to be a nuisance to the plaintiffs, and damages in respect of the said nuisance.

Nuisance caused by flooding Plaintiff's Land.

1. The plaintiff is the owner of the close called "Fairfield," on the banks of the river Eden, in the county of Cumberland. The defendant is the owner of the land immediately below the plaintiff's close.

2. On the 19th of July, 1883, and every day since that day, the defendant penned back the waters of the river Eden, and filled up a part of the bed thereof, causing the water to overflow the plaintiff's close.

Particulars of special damage :—

Value of hay crop destroyed	.	.	£
Value of wheat crop destroyed	.	.	
Total	.	£	

The plaintiff claims :—

- (1) £200 damages ;
- (2) An injunction to restrain the defendant from the continuance or repetition of the said injury, or the committal of any injury of a like kind in respect of the same property.

Defence.

The defendant says :—

1. He did not pen back the waters of the river Eden, or fill up any part of the river bed.
2. The defendant built a river wall on his own land to protect

his land against the river floods, and this is the grievance complained of. The defendant acted in necessary self-defence.

3. The injury to the plaintiff, if any, was caused by the act of God. The overflowing of the river into his close was caused by a flood of unprecedented height.

Claim for Nuisance by a Railway Company in obstructing the Plaintiff's Right of Way.

1. By virtue of a deed dated the 17th of May, 1840, and made between A. B., the plaintiff's predecessor in title, and the defendant company, and also by virtue of continuous user as of right and without interruption since that date, the plaintiff, as the owner of the T. quay, in the parish of St. John, in the county of D., is entitled to a right of way for himself, his tenants and customers, his and their agents, workmen and servants, for carriages and carts and on foot, over the defendants' land to the highway from X. to Y., at the entrance thereto opposite St. John's Church.

2. On the 19th of November, 1883, and ever since, the defendant company have obstructed the said way by raising the level of their railway as it crosses the said way, and have laid down rails on the said quay.

The plaintiff claims:—

- (1) £50 damages;
- (2) An injunction to restrain the defendant company from the continuance or repetition of the said obstructions, or the creation of any obstruction of the said way.

Defence.

The defendant company says:—

1. The plaintiff is not the successor in title of A. B., nor is he the owner of the T. quay, nor has he any interest therein, nor has he acquired, by user or prescription or otherwise, any right to the way claimed or any way over the defendant company's land. Any user by the plaintiff has not been of right, but recent and precarious, and has been regularly interrupted by the defendant company for two days, namely, the

1st of June and the 1st of December in every year since the year 1850.

2. The owners of the T. quay did not, nor did their tenants or customers, or their or any of their workmen, servants or agents, use or claim to use any way over the defendant company's land before the year 1882.

3. The way claimed was wholly blocked up by a wall built in the year 1878, and has ever since been so blocked up, and the plaintiff acquiesced in such blocking up of the said alleged way.

4. The plaintiff acquiesced in the obstruction complained of and upon the faith of his acquiescence the defendant company has incurred great expense.

Partition (a).

Partition or sale of Real Estates.

1. By will dated January 5th, 1864, A. devised Whiteacre to B., C., and D., as tenants in common.

2. On March 10th, 1865, A. died.

Partition
suits under
the 31 & 32
Vict. c. 40.

(a) The power of the Chancery Division to order the partition and sale of property has been extended, and is now regulated by the Statutes 31 & 32 Vict. c. 40. and the amending Act, 39 & 40 Vict. c. 17. As to the power of the Court to dispense with service of the decree in special cases, see 39 & 40 Vict. c. 17. By 31 & 32 Vict. c. 40, s. 9, any person who, if the Act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the Court may direct such inquiries as to the nature of the property and the persons interested therein and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration; but all persons who, if the Act had not been passed would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may within a time limited by general orders apply to the Court to add to the decree or order.

By section 3 in a suit for partition where if the Act had not been passed, a decree for partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates or of the numbers of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a

3. On March 20th, 1865, A.'s will was proved.
4. On June 25th, 1867, B. conveyed to the plaintiff his share of Whiteacre.
5. On July 30, 1869, C. conveyed his share to the defendants on trust for sale.
6. By will dated Nov. 5th, 1872, D. devised his share among his children equally.
7. On December 2nd, 1872, D. died.

division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

In a suit for partition where if the Act had not been passed a decree for partition might have been made, then if the parties individually or collectively to the extent of one moiety or upwards in the property to which the suit relates request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly and give all necessary or proper consequential directions.

Power of Court to order sale.

The jurisdiction of the Court to decree partition does not enable it to destroy the provisions of a will or to extinguish overriding trusts. See *Taylor v. Grange*, 15 Ch. Div. 165. Under a will two persons were equally entitled to real property for life, with remainder to their children and issue, who were not yet ascertained. The trustees of the will had, during the lives of the tenants for life, powers of working a quarry on the estate, and making roads over the property for the purpose, and were directed to work the quarry and divide the profits among the persons entitled. Held (affirming the decision of Fry, J.) that, while the overriding power and trust existed, the Court had no jurisdiction to make a decree for partition or sale under the Partition Acts. Compare *Biggs v. Peacock*, 20 Ch. Div. 200, where there was a subsisting power of sale, and *Waite v. Bingley*, 21 Ch. Div. 678.

Effect of overriding trusts.

It would seem that R. S. C. 1883, Order XVI. r. 8, enabling trustees to represent their beneficiaries in an action applies to an action under the Partition Acts. (*Simpson v. Denny*, 10 Ch. Div. 28; *Stace v. Gage*, 8 Ch. Div. 451.)

An order for sale may be made upon admissions in the pleadings, the further consideration being adjourned (*Brunell v. Brunell*, 11 Ch. Div. 215), and a decree may be made for partition of part of an estate and sale of the rest. (*Roebuck v. Chadbest*, L. R. 8 Eq. 127.)

Section 4 of the Partition Act 1868, is imperative and obliges the Court to order a sale where the owners of a moiety ask for it, unless the objecting parties will purchase, under Section 5, the shares of the parties asking a sale, or the Court sees some good reason why a sale should not be ordered. (*Pemberton v. Barnes*, L. R. 6 Ch. App. 685.)

When sale compulsory

But a party asking for a sale is not compellable to part with his share on a valuation. (*Pitt v. Jones*, 5 App. Cas. 651.)

As a general rule the costs of a partition suit are to be borne by the parties in proportion to their interests as declared by the judgment. (*Ball v. Kemp-Welch*, 14 Ch. Div. 512.) Costs as between solicitor and client can be taxed only by consent. (*Ibid.*)

8. On December 15, 1872, D.'s will was proved.

9. There were ten children of D. living at his decease, some of whom have since died.

10. Whiteacre consists of a mansion house, and grounds.

11. A sale of the property and a division of the proceeds will be more beneficial than a division of the property.

The plaintiff claims a sale of Whiteacre, and distribution of the proceeds among the parties interested.

Claim for Partition or Sale in an Action by Persons entitled to more than one Moiety of the Property.

1. By indentures of marriage settlement dated the 1st of December, 1860, and made between A. of the first part, B. of the second part, and C. and D. of the third part, the Langley estate in the county of Kent was conveyed to C. and D. in trust for A. for life, and after his decease subject to a jointure for B. in trust for all the children of the marriage of A. and B. in equal shares.

2. B. died in A.'s lifetime.

3. A died on May 17, 1882.

4. There were seven children of the marriage, namely, the plaintiffs E., F., and G., and the defendants, H., J., K., and L. K. and L. are infants.

5. By an indenture dated August 1, 1883, the defendant H. for value conveyed two equal third parts of his share in the estate to the plaintiff E.

6. The Langley estate consists of a mansion, park, grounds, several farms, and the manor of Langley.

7. A sale of the property and a division of the proceeds will be more beneficial than a division of the property.

The plaintiff claims a sale of the Langley estate and distribution of the proceeds among the parties interested.

Partnership (a).

Action by Executor of deceased Partner for an Account and Winding-up of Partnership Business.

1. On June 1, 1880, A., B., and C. entered into partnership as wholesale druggists for ten years.
2. On July 31, 1882, A. died, having by his will dated July 27, 1882, appointed the plaintiff his sole executor.

(a) By the Judicature Act, 1873, s. 34, partnership actions involving the taking of accounts or a dissolution of the partnership, are to be brought in the Chancery Division.

As a general rule, the Court will not decree specific performance of an agreement for a partnership, damages being a more appropriate remedy (*Scott v. Rayment*, L. R. 7 Eq. 112); but it may do so if the contract has been partly performed, and the contract is for a partnership for a definite time (*Craichway v. Maule*, 1 Swan. 510). But the Court will restrain a breach of partnership articles by injunction. A partnership may come to an end by the agreement of the partners, or by effluxion of time, or by any partner dying, becoming bankrupt, or being convicted of felony, or assigning all his property. The Court will also decree a dissolution if the partnership contract is tainted with fraud, or if either party grossly violates the partnership articles. If the relations of the partners are such that the Court sees that they cannot carry on business together, it will decree a dissolution; but it will not interfere in cases of trifling breaches, or where there is a mere partnership squabble. A dissolution would be decreed against a partner who wrongfully and habitually neglected the business, or who should become permanently unfit to do his duty, as by becoming insane. See *Jamney v. Knowles*, 29 L. J. Ch. 95 a case of fraud and quarrels. Cf. *Snell's Principles of Equity*, pp. 499, et seq.

When Court will decree dissolution.

The Court may appoint a receiver and manager of the business, but this is not done unless the suit is for a dissolution.

If the action is not for a dissolution, but merely for an account, the account will only be directed at the suit of the party complaining up to the commencement of the action. As to the principle upon which the accounts are taken, see *Browne v. Collins*, L. R. 12 Eq. 586; *Ibbatson v. Elam*, L. R. 1 Eq. 188; and *Dran v. Mudgowl*, 8 Ch. Div. 345.

A co-partnership in profits is a co-partnership in the assets by which they are made. (*Syers v. Syers*, 1 App. Cas. 174, per Cairns, L. C.)

By the Partnership Act, 1865 (28 & 29 Vict. c. 86), it is provided that:—The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

The Partnership Act, 1865.

No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by

3. On Aug. 17, 1882, the plaintiff proved the will.

4. The assets of the partnership and the debts due by the partnership on July 31, 1882, have not been got in and paid.

Provisions of the Partnership Act, 1865. such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

No person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to the liabilities of the person carrying on such business.

In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of Insolvent Debtors, or entering into an arrangement to pay his creditors less than 20s. in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied.

Decisions on the Act.

In order to bring a case within the statute, where the transaction is alleged to have been one of loan merely, there must be a contract in writing, and the document must show on the face of it that the transaction is one of loan, and parol testimony to vary it is inadmissible. (*Sykes v. Sykes*, 1 App. Cas. 174.) The statute has not received a very liberal construction (*Poolley v. Driver*, 5 Ch. Div. 458), and great care is necessary on the part of persons who wish to take advantage of its provisions. (Cf. *Holme v. Hammond*, 7 Ex. 218; *Ex parte Mills, re Tees*, L. R. 3 Ch. 569.) The Act applies to a loan made upon the personal responsibility of the trader or traders to whom it is made, and not to a loan made on the security of the business. (*Ex parte Delhousie*, 7 Ch. Div. 511.)

Partners cannot generally sue each other at law.

[*Actions between partners.*—As a general rule one partner could not before the Judicature Acts came into force sue another member of his firm in a Court of law. There were a few exceptions to this rule, as for instance, where a partner sued another for breach of an agreement to enter into a partnership (*Gale v. Leckie*, 2 Stark. 107); or if one partner was turned out by the other or others (*Greenham v. Gray*, 4 Ir. Ch. 301). Again, if no matter of account was involved, and if the damages sought to be obtained would not belong to the firm, or would not have to be paid out of the funds of the firm, an action at law was maintainable, irrespective of the state of the accounts between the partners. Thus an action for not rendering an account (*Owston v. Ogle*, 13 East, 338); an action for a penalty stipulated to be paid for breach of agreement (*Raderhurst v. Bates*, 3 Bing. 463); an action for not indemnifying the plaintiff against a debt (*Went v. Reece*, 1 Bing. 18); an action for not putting the plaintiff in funds to enable him to defray expenses as agreed (*Brown v. Tupscot*, 6 M. & W. 119); have all been held to be maintainable by one partner against his co-partner or co-partners.

When they can.

The concluding words of R. S. C. 1883, Order XVI. rule 14, do not seem altogether to settle the doubt raised by *Ex parte Fyning*, 19 Ch. Div. 124, whether the corresponding rule applied to a partnership dissolved before the issue of the writ. But judgment in such an action would not *per se* bind a partner who had retired, and who was neither served as partner nor had admitted in the pleadings that he was or had been adjudged to be a partner. (*Ibid.*)

The plaintiff claims :

- (1) An account of the partnership debts, assets, and transactions, and all necessary inquiries.
- (2) Payment of A.'s share of the net assets of the partnership.
- (3) If necessary, a receiver.

Action against Partner for Breach of the Partnership Articles.

1. The plaintiff has suffered damage by the defendant's breach of contract to enter into partnership with the plaintiff for ten years from June 24, 1883. The contract is contained in an indenture dated the 22nd of June, 1883, and made between the plaintiff and the defendant.

2. On June 24, 1883, the defendant refused to fulfil the said contract, and refused to admit the plaintiff to the partnership

Where the writ in an action is issued against a partnership firm in the name of the firm, the judgment must be against the firm, and it cannot be entered separately against an individual and member of the firm who has made default in appearing to the action. (*Jackson v. Litchfield*, 8 Q. B. D. 474.)

The form of the proceedings is most material. Thus in the very recent case of *Munster v. Bailton*, 11 Q. B. D. 435, the plaintiff issued a writ against the firm of R. & Co. R. only appeared to the writ, and the plaintiff delivered statement of claim against R., sued as "R. & Co." Issue having been joined, the case proceeded to trial, when a verdict for the plaintiff was taken by consent, and judgment signed against "R. sued as R. & Co." The plaintiff having subsequently discovered that C. had been a member of the firm of R. & Co., applied for an order to amend the judgment by making it in accordance with the writ, a judgment against the firm of R. & Co. Held that the amendment ought not to be allowed, for the plaintiff, although he acted in ignorance of the facts, must be taken to have elected to sue R. alone, and was concluded by the form of the proceedings subsequent to the appearance.

Procedure
in actions
against
firms.

Where a change takes place in the constitution of a firm, creditors of the old firm may so deal with the new firm as to be held to have elected to discharge the old firm and to accept the new firm as their debtors.

In regard to another class of cases in which it is sought to make a retiring partner liable for debts of the firm incurred after his retirement, on the ground of a continuous holding out, the retirement not having been published, it is to be remembered that the retiring partner is liable on the ground of estoppel only. It was so held in the late case of *Scarf v. Jardine*, 7 App. Cas. 345; 51 L. J. C. P. 613.

Liability of
retiring
partner.

An action and a judgment against two persons who had borrowed money from the plaintiffs (although the judgment is unsatisfied) constitute a bar to another action brought by the same plaintiffs against a third person, who is afterwards discovered to have been really interested, as a partner, with the two debtors in the business for the purpose of which the money had been borrowed. (*Kendall v. Hamilton*, 4 App. Cas. 504.) This result does not depend on the doctrine of election.

premises, or to carry on the partnership business with the plaintiff.

The plaintiff claims £500 damages.

Defence.

The defendant says that :—

1. He did not refuse to fulfil the contract or to admit the plaintiff to the partnership premises or to carry on the partnership business with the plaintiff.
2. It was a condition precedent to the partnership and the execution of the contract that the plaintiff should pay a premium of £1000 to the defendant, which he has not done.

Action for Dissolution of Partnership.

1. The plaintiff on December 20, 1875, entered into partnership articles with the defendant for ten years.

2. The defendant has broken the partnership articles as follows :—

- (1) He has become surety for A. B. in a bail bond for £500 without the plaintiff's consent.
- (2) He has sold and delivered partnership effects to C. D. after being forbidden by the plaintiff so to do.
- (3) He has pawned the partnership effects to E. F.
- (4) He has accepted bills of exchange in the partnership name, and applied the proceeds to his private purposes.
- (5) He has habitually neglected to attend at the partnership place of business, and to perform the ordinary work of a partner.

The plaintiff claims :—

- (1) Dissolution.
- (2) Accounts and inquiries.
- (3) A receiver and manager.

Action by incoming Partner for Dissolution and return of Premium and other Relief.

The plaintiff was induced by the fraud of the defendant to enter into partnership with the defendant in the business of

manufacturing chemists from December 11, 1877, and in consideration thereof and of a fifth share of the goodwill and assets of the business to pay and he did pay to the defendant the sum of £5000.

2. The said fraud was as follows : The defendant by letters dated the 1st and 3rd of December, 1877, falsely and fraudulently represented to the plaintiff that his average yearly profits in the said business were £10,000, and that he had 500 customers in the said business.

3. The said average yearly profits did not exceed £800, and the number of customers did not exceed 40, as the defendant well knew when he made the said representations.

4. The plaintiff has paid the sum of £2000 in satisfaction of certain debts of the partnership.

The plaintiff claims :

- (1) Rescission of the partnership contract, or a dissolution.
- (2) Accounts and inquiries.
- (3) A receiver and manager.
- (4) Payment of £7000 and interest.
- (5) A declaration that the plaintiff is entitled to a lien or charge upon the partnership assets in respect of the said sums of £5000 and £2000, and of any other sums payable by him in respect of the partnership.

Patents (a).

Injunction, &c., for Infringement of Patent.

The defendant has infringed the plaintiff's patent, No. 14,084, granted for the term of 14 years from the 21st May,

(a) The law regarding patents for inventions is from December 31, 1883, regulated by the Statute 46 & 47 Vict. c. 57, by which it is provided in Section 5 :

Patent Act
of 1883.

(1) An application for a patent must be made in the form set forth in the First Schedule to this Act, or in such other form as may be from time to time prescribed ; and must be left at, or sent by post to, the Patent Office in the prescribed manner.

(2) An application must contain a declaration to the effect that the applicant is in possession of an invention, whereof he, or in the case of a joint application, one or more of the applicants, claims or claim to be the true and first inventor or inventors, and for which he or they desire

1880, for certain improvements in the manufacture of iron and steel, whereof the plaintiff was the first inventor.

The plaintiff claims an injunction to restrain the defendant from further infringement and £100 damages.

Particulars of breaches are delivered herewith.

Leading provisions of the Patent Act, 1883.

or desire to obtain a patent; and must be accompanied by either a provisional or complete specification.

(3) A provisional specification must describe the nature of the invention, and be accompanied by drawings, if required.

(5) A specification, whether provisional or complete, must commence with the title, and in the case of a complete specification, must end with a distinct statement of the invention claimed.

Sec. 6. The Comptroller shall refer every application to an examiner, who shall ascertain and report to the Comptroller whether the nature of the invention has been fairly described, and the application, specification, and drawings (if any) have been prepared in the prescribed manner and the title sufficiently indicates the subject-matter of the invention.

Sec. 7 (1) If the examiner reports that the nature of the invention is not fairly described, or that the application, specification, or drawings has not or have not been prepared in the prescribed manner, or that the title does not sufficiently indicate the subject-matter of the invention, the Comptroller may require that the application, specification, or drawings be amended before he proceeds with the application. (2) Where the Comptroller requires an amendment, the applicant may appeal from his decision to the law officer. (3) The law officer shall, if required, hear the applicant and the Comptroller, and may make an order determining whether and subject to what conditions, if any, the application shall be accepted. (4) The Comptroller shall, when an application has been accepted, give notice thereof to the applicant. (5) If after an application has been made, but before a patent has been sealed, an application is made, accompanied by a specification bearing the same or a similar title, it shall be the duty of the examiner to report to the Comptroller whether the specification appears to him to comprise the same invention, and if he reports in the affirmative, the Comptroller shall give notice to the applicants that he has so reported. (6) Where the examiner reports in the affirmative, the Comptroller may determine, subject to an appeal to the law officer, whether the invention comprised in both applications is the same, and if so, he may refuse to seal a patent on the application of the second applicant.

Sec. 11. Any person may at any time within two months from the date of the advertisement of the acceptance of a complete specification give notice at the Patent Office of opposition to the grant of the patent on the ground of the applicant having obtained the invention from him or from a person of whom he is the legal representative, or on the ground that the invention has been patented in this country, or on an application of prior date, or on the ground of an examiner having reported to the Comptroller that the specification appears to him to comprise the same invention as is comprised in a specification bearing the same or a similar title and accompanying a previous application, but on no other ground. (2) Where such notice is given the Comptroller shall give notice of the opposition to the applicant and shall, on the expiration of those two months, after hearing the applicant and the person so giving notice, if desirous of being heard, decide on the case, but subject to appeal to the law officer. (3) The law officer shall, if required, hear the applicant and any person so giving notice, and being in the opinion of the law officer entitled to be heard in opposition to the grant, and

Defence.

The defendant says that :—

1. The defendant did not infringe the patent.
2. The invention was not new.
3. The plaintiff was not the first or true inventor.

shall determine whether the grant ought or ought not to be made. (4) The law officer may, if he thinks fit, obtain the assistance of an expert, who shall be paid such remuneration as the law officer, with the consent of the Treasury, shall appoint. Loading provisions of the Patent Act, 1883.

Sec. 28 (1) In an action or proceeding for infringement or revocation of a patent, the Court may, if it thinks fit, and shall on the request of either of the parties to the proceeding, call in the aid of an assessor specially qualified and try and hear the case wholly or partially with his assistance; the action shall be tried without a jury unless the Court shall otherwise direct. (2) The Court of Appeal or the Judicial Committee of the Privy Council may, if they see fit, in any proceeding before them respectively, call in the aid of an assessor as aforesaid. (3) The remuneration, if any, to be paid to an assessor under this section, shall be determined by the Court, or the Court of Appeal, or Judicial Committee as the case may, and be paid in the same manner as the other expenses of the execution of this Act.

Sec. 29 (1) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the Court or the Judge at any subsequent time particulars of the breaches complained of. (2) The defendant must deliver with his statement of defence, or by order of the Court or a Judge at any subsequent time, particulars of any objections on which he relies in support thereof. (3) If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty, must state the time and place of the previous publication or user alleged by him. (4) At the hearing no evidence shall, except by leave of the Court or a Judge, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered. (5) Particulars delivered may be from time to time amended by leave of the Court or a Judge. (6) On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant, and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court or a Judge to have been proven or to have been reasonable and proper without regard to the general costs of the case.

Sec. 30. In an action for infringement of a patent the Court or a Judge may on the application of either party make such order for an injunction, inspection, or account, and impose such terms and give such directions respecting the same and the proceedings thereon as the Court or a Judge may see fit.

Sec. 31. In an action for infringement of a patent, the Court or a Judge may certify that the validity of the patent came in question, and if the Court or Judge so certifies then in any subsequent action for infringement the plaintiff in that action on obtaining a final order or judgment in his favour shall have his full costs, charges, and expenses as between solicitor and client, unless the Court or Judge trying the action certifies that he ought not to have the same.

Sec. 32. Where any person claiming to be the patentee of an invention by circulars, advertisements, or otherwise threatens any other person with

1. The invention is not useful.
2. [Denial of any other matter of fact affecting the validity of a patent.]

Particulars of objections are delivered herewith.

A person is entitled to relief in respect of any alleged manufacture, use, sale, or importation of the invention by any person or persons aggrieved thereby and wrong done to him in this behalf, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or importation to which the threats related was not in fact an infringement of any legal rights of the person making such threats: provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent.

What
amounts to
an in-
fringement
of patent
rights.

In respect of matters where there has been a violation of a patent, the existence of an intention to violate it is immaterial. (*Stead v. Anderson*, 4 C. R. 266.) Proof that the defendant sold the patented article without evidence of his having made it or procured it to be made was held sufficient to warrant a jury in finding that an infringement had been committed. (*Wright v. Lanchester*, 29 L. J. C. P. 275.) So the selling of articles made by the patented machine, even though the defendant did not know of the patent. (*Wright v. Hitchcock*, L. R. 5 Ex. 37.) The plaintiff must prove where the breach is denied that the article was not made by him or his agent. (*Betts v. Willmott*, L. R. 6 Ch. 239.)

It is no defence that the defendant's servants had in the course of their business committed the infringement contrary to his express directions. (*Betts v. De Vitre*, L. R. 3 Ch. 429.)

To import the patented article from abroad when the patent did not extend beyond England is an infringement. (*Elmslee v. Bournier*, L. R. 9 Eq. 217.) Even in such circumstances the transitory resting of the patented article in England was held to be an infringement. (*Betts v. Neilson*, L. R. 3 Ch. 429; affirm. L. R. 5 H. L. 1.)

The Crown
cannot be
guilty of
an infringe-
ment.

The Crown is not bound by letters patent, and consequently cannot be guilty of an infringement. (*Fother v. The Queen*, 35 L. J. Q. B. 300.) This does not apply to contractors under the Crown. (*Thomas v. The Queen*, L. R. 3 10 Q. B. 131.) When a patent has been prolonged, it has been usual to insert a condition reserving the rights of the Crown. (*Re Napier's Patent*, 6 App. Cas. 174.)

Measure of damages.—If the plaintiff has been in the habit of licensing the use of the invention for a fixed royalty, such royalty will be the measure of damages for the infringement of the patent, unless perhaps he has been in the habit of charging infringers with a higher royalty, in which case the higher royalty may be given as damages. (*Penn v. Jack*, L. R. 5 Eq. 81.)

Defences :
(1) A de-
nial of
breach.

Defences.—Besides the denial of breach, as to which the preceding authorities will be found useful, the defendant may raise the following defences among others :—

(2) Prior
use of the
patented
article—no
novelty.

Denial of novelty.—Prior use of the patented article, even though not general, if the use was not secret, will avoid the patent. (*Carprater v. Smith*, 9 M. & W. 300; *Patterson v. Gas Co.*, 3 App. Cas. 239.) If the prior use was public, it does not matter that the person using it made a secret of the process. (*Heath v. Smith*, 23 L. J. Q. B. 166.) It is not necessary in order to invalidate the patent to show that the article had been previously manufactured for sale. (*Betts v. Neilson*, *supra*.) The exhibition of a useless machine which turns out a failure will not affect the right of a patentee, who subsequently makes a useful machine,

Action by Assignee of a Patent against an Infringer for an Injunction and an Account of Profits.

1. On the 1st of January, 1883, a patent, No. 79,767, was duly granted under the Great Seal to A. B. for the term of 14 years from the same day, for certain improvements in the

though somewhat similar to the former useless one. (*Murray v. Clayton*, L. R. 7 Ch. 570.)

The application of an old contrivance to a purpose similar or analogous to that to which it was formerly applied, is not sufficient to sustain a patent. (*Harwood v. Great Northern Ry. Co.*, 31 L. J. Q. B. 198, and 35 L. J. Q. B. 27; *Jordan v. Moore*, L. R. 1 C. P. 624; *Parkes v. Stevens*, L. R. 8 Eq. 358; affirm. L. R. 5 Ch. 36.) However the application of an old contrivance or machine to a purpose so different from that to which it was before applied, that the application would not obviously suggest itself, may be the subject of a valid patent. (*Penn v. Bibby*, L. R. 2 Ch. 127; *Arnold v. Bradbury*, L. R. 6 Ch. 706; *Cannington v. Stittall*, L. R. 5 H. L. 205.)

What amounts to novelty.

Insufficiency of specification.—The omission of any part of the provisional specification of a patent out of the complete specification will not vitiate the patent if there be no fraud, and the effect of the remainder is not affected by the omission. (*Penn v. Bibby*, L. R. 2 Ch. 127, 133; *Thomas v. Welch*, L. R. 1 C. P. 192.) Under the old law it was held that if there be a departure in the complete from the provisional specification, the patent is bad. (*Penn v. Bibby*, *supra*.) A specification which professes to effect the proposed object by either of two ways is bad, if it is shown that the object can only be effected by one of them (*Il. v. Cutler*, 14 Q. B. 372, n.); even though a competent workman would adopt the effectual way. (*Samson v. Holliday*, L. R. 1 H. L. 315.) As to the construction of the specification, see *Weymann v. Corcoran*, 13 Ch. Div. 65.

(3) The insufficiency of the specification.

Non-registration.—Where a patent has been assigned and the defendant denies the assignment, the plaintiff must show that the assignment has been registered pursuant to 15 & 16 Vict. c. 83, s. 35, for until registration the title remains in the assignor. But the assignee may sue the assignor for an infringement before registration. (*Hassall v. Wright*, L. R. 10 Eq. 509.) The registration relates back to the date of the assignment so as to include interim infringements. (*Ib.*)

(4) Where assignment in question, want of registration.

RENEWAL.

The statute 46 & 47 Vict. c. 57, s. 25, preserves the jurisdiction of the Judicial Committee over applications for renewals. As to the conditions on which a further time may be granted to a patentee, see *In re Adair's Patent*, 6 App. Cas. 176.

Under the Patent Law Amendment Act, 1852, s. 43, when, at the time, the Court was of opinion that there had been an infringement of the patent by the defendant, but held as a legal ground that the patent was void, it refused to give the plaintiff a certificate that breaches of the patent by the defendant had been proved. (*United Telephone Co. v. Harrison & Co.*, 21 Ch. Div. 720.)

Before the new Act it was held (*Hilsey v. Brotherhood*, 19 Ch. Div. 386) that the holder of a patent, the validity of which is not impeached,

manufacture of electric lighting machines, whereof the said A. B. was the first inventor.

2. By deed dated the 2nd of January, 1884, A. B. assigned the patent to the plaintiff.

3. The defendant has infringed the said patent.

The plaintiff claims an injunction to restrain the defendant from further infringement, and an account of profits, or damages.

Particulars of breaches are delivered herewith.

Defence.

The defendant says that:—

1. A. B. was not the first or true inventor.
2. The invention (if any) was not new.
3. The invention (if any) was not useful.
4. The specification filed by A. B. does not show in what manner the invention is to be and is performed.
5. The defendant did not infringe the patent.
6. The patent was not assigned to the plaintiff.

Particulars of objections are delivered herewith.

Reply.

The plaintiff says that:—

1. As to the first four paragraphs of the statement of defence, in an action of "*X. v. Y.*", 1884, X. No. 700," in the Queen's Bench Division (in which the present plaintiff was plaintiff), the validity of the patent came in question, and the Court, on the trial thereof, so certified, and the validity of the patent was upheld.

2. As to the whole of the statement of defence, he joins issue.

who issues notices against purchasing certain articles, alleging that they are infringements of his patent, and threatening legal proceedings against those who purchase them, was not liable to an action for the injury done to the vendor's trade, provided the notices were issued *bona fide*. See now s. 32 of the statute 46 & 47 Vict. c. 57.

Where upon an assignment of a patent the assignee covenants for himself and his assigns to pay a certain royalty to the patentee, no subsequent assignee taking with notice of this contract can refuse to give effect to it. (*Werderman v. Société Générale d'Electricité*, 19 Ch. Div. 246.)

*Action against a Person claiming to be a Patentee, and uttering
groundless Threats of legal Proceedings.*

1. The defendant, by circulars addressed to A. B. and C. D. in the month of August, 1884, and by advertisements inserted in the *Standard* newspaper on the 7th and 14th of the same month, claimed to be the patentee of an invention for improvements in sewing machines, and threatened the plaintiff and any person who should manufacture or use the said invention with an action for infringement.

2. The plaintiff was then using the said invention, as the defendant then well knew.

3. By reason of the said threats, one L. M., a customer of the plaintiff, ceased to purchase from the plaintiff sewing machines to which the said alleged invention had been applied, whereby the plaintiff suffered damage.

4. The user as aforesaid of the said alleged invention was not in fact an infringement of any legal right of the defendant.

The plaintiff claims :—

- (1) £100 damages;
- (2) An injunction.

Penalty (a).

*1. Claim in an Action for Penalty of £100 a Day against a
Member of Parliament.*

1. The defendant A. B. was a candidate for election to the House of Commons at an election held for the borough of P., and was, on the 1st of May, 1884, declared duly elected.

(a) "Where a penalty is created by statute and nothing is said as to who may recover it, and it is not created for the benefit of a party aggrieved, and the offence is not against an individual it belongs to the Crown and the Crown alone can maintain a suit for it." And "to enable a common informer to maintain an action for a penalty created by statute, an interest in the penalty must be given to him by express words or by express implication." (*Clarke v. Bradlaugh*, 8 App. Cas. 354.) It was held that a penalty of £500 "to be recovered by action in one of Her Majesty's superior Courts at Westminster," which is imposed by the Parliamentary Oaths Act, 1866 (the 29 & 30 Vict. c. 19), s. 5, upon any member of the House of Commons, acting as such in the House, or

All penalties *prima facie* belong to the Crown.

2. The return of the defendant's election expenses, accompanied by the declaration required by the statute in that behalf, was not transmitted to the returning officer for the borough of P. within thirty-five days after the said 1st of May.

3. The defendant sat and voted in the House of Commons

sitting during any debate after the Speaker has been chosen, without having made and subscribed the oath thereby appointed, cannot be recovered in an action by a common informer and can be sued for only by the Crown. (*Ibid.*)

Within
what time
informers
must sue.

Actions brought by common informers suing for their own benefit, must be brought within one year of the incurring of the penalty (31 Eliz. c. 5). On the other hand an action brought by "a party grieved," that is, to use the language of Lush, L. J., in *Robinson v. Currey* (7 Q. B. Div. 475), "a person who has sustained a legal loss or liability by an act done, in respect of which the penalty is given," may be commenced within two years (3 & 4 Wm. IV. c. 42). But a person who is neither a common informer, nor a party grieved, and who is suing for the benefit of the public, may bring his action after the lapse of two years. (*Robinson v. Currey, supra.*) The particular statute which creates the offence and gives the penalty may fix another time within which the action must be brought.

Penalties
for illegal
practices in
connection
with elec-
tions.

The cases where actions are given for penalties are very numerous, and a few of them can only be glanced at here. By the Corrupt and Illegal Practices Prevention Act, 1883 (the 46 & 47 Vict. c. 51, s. 33), any Member of Parliament who sits or votes after the day on which the return of his election expenses ought to have been made without having duly made it, "shall forfeit £100 a day for every day on which he so sits or votes to any person who sues for the same."

The 7th Section of the Corrupt Practices Act of 1854 is still law, by which any candidate at an election who *gives or provides* a ribbon or cockade for any person living in the constituency which he is contesting forfeits the sum of £2 to such person as shall sue for the same, together with full costs of suit.

Penalties
for acting
as solicitors
without qualifica-
tion.

The 23 & 24 Vict. c. 127, s. 26, enacts that every person who acts as an attorney or solicitor, or who in his own name or in the name of any other person in anywise acts as a proctor in or with respect to any proceedings in the Court of Probate without being duly qualified, shall forfeit for every such offence the sum of £50. Upon this section it was decided by the House of Lords, in the *Law Society of the United Kingdom v. Waterlow* (8 App. Cas. 407), that where law stationers were accustomed upon the instructions and in the names of London or country solicitors to take to the Registry of the Probate Division original wills and the engrossments thereof, with proper affidavits, and if these were in order to fetch away the probate, and all the charges between solicitor and client were made by the solicitors, and the stationers charged the solicitors for their clerk's time only—that in these circumstances the stationers had not acted as solicitors and proctors and were not liable to the penalty.

By Section 15 of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), any person, who not being a duly registered chemist, sells or opens shop for the sale of poisons, or who uses the name of chemist and druggist, is liable to a penalty of £5. It was held in *The Pharmaceutical Society of Great Britain v. The London and Provincial Supply Association, &c.* (L. J. 737 (H. L.)), that the word "person" in the statute does not include a corporation, and that a corporation having a department for the sale of drugs under the management of a duly registered chemist is not liable

on the 16th of June, 1884, after the expiration of the time limited for transmitting such return, and before its transmission, and before the allowance of any authorised excuse for the failure to transmit.

The plaintiff claims the penalty of £100.

2. Claim in an Action for a Penalty of £50 against a Member of a Local Board who is concerned in a Contract with the Board.

1. On the 10th of May, 1880, the defendant was a member of the G. Local Board.

2. On the said 10th of May, 1880, and while the defendant was still a member of such Local Board, he contracted to sell and actually sold to the said Local Board a large quantity of stone, and participated in the profit of the said contract.

The plaintiff claims the penalty of £50.

3. Claim in an Action for Penalty for Selling Poisons without being registered.

1. The defendant at the time of the committing of the offence hereinafter mentioned was not a duly registered pharmaceutical chemist, or chemist and druggist.

2. On the 3rd of February, 1879, he sold a certain poison in his shop, 10, T. Road, Chelsea.

3. From the 1st of February, 1879, until the 10th of March,

to the penalty. Lord Blackburn, however, intimated that probably a corporation employing an unqualified manager would be liable.

By Rule 64 of Schedule 2 of the Public Health Act, 1875 (38 & 39 Vict. c.55), it is declared that any member of a local board who "in any manner is concerned in any bargain or contract entered into by such board" shall "cease to be such member and his office as such shall thereupon become vacant;" and Rule 70 imposes a penalty of £50 on "any person who, not being duly qualified to act as member of a local board," "or being disabled from acting by any provisions of this Act, acts as such member." In *Fletcher v. Hudson*, 7 Q. B. Div. 611; 51 L. J. Q. B. 48, it was held by the majority of the Court of Appeal that a member of such a board who having been concerned in a contract by the board has, therefore, ceased to be such member by force of Rule 64, is a person disabled from acting as a member by the provisions of this Act, and therefore if he does act he is liable to the penalty of £50. See also *Hemmings v. Williamson*, 11 Q. B. Div. 538.

In an action for penalties the plaintiff is not entitled to administer interrogatories or to discovery of documents. (*Hemmings v. Williamson*, 10 Q. B. Div. 459.)

Penalty on member of Local Board concerned in contract with Board.

1870, the defendant kept an open shop for the retailing, dispensing, and compounding of poisons.

4. Between the said dates he also took, used, and exhibited the name or title of a chemist or druggist at his said shop No. 10, T. Road, Chelsea.

The plaintiff claims the penalty of £5.

Performance.

(See *Specific Performance*.)

Principal and Surety.

(See *Guarantee*.)

Promissory Notes.

(See *Bills of Exchange*.)

Prospectus.

(See *Misrepresentation*.)

Recovery of Land (a).

Landlord against Tenant whose Term has expired, &c.

1. The plaintiff is entitled to possession of a farm and premises called Church Farm, in the parish of St. James, in the

Pleadings
in actions
for the re-
covery of
land
now
necessary.

(a) Before the Judicature Acts and Rules came into force there were no pleadings in actions for the recovery of land, houses, &c. Since then, however, the *plaintiff* (not the claimant as formerly) must, under Order XIX. r. 4, state the grounds on which he seeks to recover the land, &c., either with or without mesne profits, as in other actions. This action, however, presents an exception to other actions in this respect, that no other cause of action can be joined with it, except claims for mesne profits and arrears of rent or double value in respect of the premises claimed, and damages for breach of any contract "under which the same

county of Surrey, which was let by the plaintiff to the defendant for the term of three years, from the 29th of September, 1879, which term has expired [*or*, as the tenant from year to year from the 29th September, 1875, which said tenancy was

or any part thereof are held, or for any wrong or injury done to the premises claimed." (See Order XVIII. r. 2.) This applies to counter-claims. (*Compton v. Preston*, 21 Ch. Div. 138.) The word contract, though usually applied to simple contracts, is no doubt used here in its strictly legal sense, and would include covenants.

Formerly it was necessary for a claimant in ejectment to show a legal title. This has been changed by the 24th section of the Judicature Act of 1873, which enables equitable owners to sue in any division. And by sect. 25 it is expressly provided that a mortgagor entitled to the possession of land may sue for the recovery thereof in his own name, if the mortgagee have not given notice of his intention to enter into possession or receipt of the rents and profits thereof.

On the other hand, inasmuch as there were formerly no pleadings in the action of ejectment, it was impossible for a defendant to avail himself of the provisions of the Common Law Procedure Act, 1854, allowing equitable defences at law. This is altered by the Judicature Acts, under which pleadings have been introduced into it, and also by the provision of the Judicature Act, 1873 (sect. 24, sub-sect. 2), that equitable defences may be pleaded as in a Court of Equity before the passing of the Act.

Formerly, the corresponding action of ejectment could only have been brought in the county within which the premises were situate, unless, under the Common Law Procedure Act, 1852, the Court or a judge ordered it to be tried elsewhere. Now, however, that local venues have been abolished by the Judicature Acts (see Order XXXVI. r. 1), it is clear that the action may be tried wherever the plaintiff proposes to try it, unless the Court orders it to be tried elsewhere; and if no county or place is named, it is to be tried in Middlesex.

The general law, however, applicable to such actions is not altered, and it is therefore necessary to give a summary of it.

One or other of the following persons is generally the plaintiff in an action for the recovery of land, namely, landlords, heirs-at-law, devisees, mortgagees, executors and administrators, trustees of bankrupts, and parsons.

Landlords.—In actions for recovery of land brought by landlords against tenants they are in general not required to prove their own title, but merely the demise and its expiration, and tenants cannot in general dispute the lessor's title or that of his assignee. (*Cuthbertson v. Irving*, 29 L. J. Ex. 485, Ex. Ch.) The assignee or sub-tenant of the lessee is equally estopped. (*London & N. W. Rail. Co. v. West*, L. R. 2 C. P. 553.) This doctrine of estoppel applies in the case of encroachments made by a tenant on land adjoining belonging to a stranger, and then held by the tenant as part and parcel of the demised premises. (*Liaburn, Earl of, v. Davies*, L. R. 1 C. P. 259. See also *Whitmore v. Humphries*, L. R. 1 C. P. 1.) But if a defect of the lessor's title appears in the lease, the tenant is not estopped from showing the defect. (*Saunders v. Merryweather*, 35 L. J. Ex. 115.)

Proof of tenancy, and termination thereof.—Tenancy at will arises where a person has been let into possession pending a treaty for a purchase or lease (*Right v. Beard*, 13 East, 210), or under a void or imperfect lease or conveyance, or where having been tenant for a term which has expired, he continues in possession negotiating for a new one. In his case the tenancy is determined by either a formal demand of pos-

A person having a merely equitable title may now sue for the recovery of land.

Equitable defences may be pleaded.

The action may now be tried wherever the plaintiff selects.

Landlord not bound to prove his title as against a tenant.

What is a tenancy at will.

duly determined by notice to quit, expiring on the 29th of September, 1881].

The plaintiff claims possession, and £50 mesne profits.

How it
arises and
how ended.

session or by any act inconsistent with a tenancy at will, such as granting a lease to another to commence at once, and giving him possession (*Wallis v. Delmar*, 29 L. J. Ex. 276), or an entry by the landlord and an exercise of ownership by him. (*Turner v. Bennett*, 9 M. & W. 643.)

A yearly
tenancy,
how
created
and how
terminated.

A tenancy from year to year is shown, in the absence of other evidence, by payment and receipt of yearly rent. If a person having a lease void by statute, or an agreement for a lease, enter into possession and pay rent at so much a year, this makes him a tenant from year to year on such terms of the void lease or of the agreement as are not inconsistent with such a holding. (See notes to *Doe d. Rigge v. Bell*, 2 Sm. L. Cas. 7th ed. 96.) The same presumption holds where a corporation is either landlord or tenant, and the lease is void as not being by deed. (*Eccles. Com. v. Merril*, L. R. 4 Ex. 162.) If a tenant holds over after the determination of his term, and pays rent, the presumption is that he holds from year to year, even though the rent is increased by agreement. (*Hyatt v. Griffiths*, 11 Q. B. 505.) This form of tenancy is terminated by six months' notice, to be given six clear months before the termination of any whole year from its commencement. Thus, if it commence on the 25th December, 1870, notice to terminate it at the end of the first year must be given six months before 25th of December, 1871, and so on. So that it must continue one year at least, and a number of whole years afterwards. But as to notice to quit agricultural holdings, see the Agricultural Holdings Act, 1883. As to what constitutes a good notice to quit, see Woodfall's Landlord and Tenant, 11th ed. 300—323.

How
tenancies
for years
created.

Longer tenancies are generally created by lease or agreement. Leases for over three years must be by deed under the joint effect of the Statute of Frauds and the 8 & 9 Vict. c. 106. For full information as to the creation, &c., of tenancies, see Woodfall's Landlord and Tenant, 11th ed. 116.

Tenancies under leases or agreements are terminated by effluxion of time, notice in certain cases, and forfeiture for non-payment of rent, or by breach of covenant or otherwise. In cases of forfeiture, the forfeiture should, in the case of an assignee of the reversion suing, have accrued after the assignment, as the right of entry, unless clearly referred to, does not pass thereby. (*Hunt v. Bishop*, 22 L. J. Ex. 337; and see *Hunt v. Remnant*, 23 L. J. Ex. 135, Ex. Ch.) Such a right, however, passes to the devisee of the reversion under 1 Vict. c. 26, s. 3, and therefore the same doctrine would not hold in his case.

Where
landlord
proceeds
at com-
mon law,
strict
compliance
with all
formalities
requisite.

If the landlord proceeds under the common law as opposed to the statutory remedy mentioned in the next paragraph, he must prove (but the statement of claim need not show) that all the ceremonies of the common law have been strictly complied with, as the demand by the landlord or his agent of the precise rent payable to save a forfeiture on the exact day on which it became due, and payable at a proper place of payment, and at a convenient hour before and at sunset. (R. & C. Ord. XIX. r. 14; 1 Wms. Saund. 278, *et seq.* (16); and see *Herry v. Glover*, 10 Ir. C. L. R. 113, C. P.) Such formalities may, however, be dispensed with by express stipulation. (*Phillips v. Bridge*, L. R. 9 C. P. 48.)

Statutory
remedy
given to
landlords
to recover

Under the Common Law Procedure Act, 1852, s. 210, if half a year's rent is in arrear, and the landlord has a right by law to re-enter for non-payment, he may, without any formal demand or re-entry, serve his writ (the manner is prescribed by the section), and if it appear in the case of judgment by default, by affidavit or on the trial, that six

Heir-at-law against Stranger.

1. The plaintiff is entitled to the possession of Blackacre, in the parish of — [or, of No. 2, Bridge Street, Bristol], in the county of —.

months' rent was due before service, and that no sufficient distress was then to be found on the premises, and that the lessor had power to enter, then he will be entitled to judgment and execution as if the rent had been formally demanded, and the landlord had re-entered. Proceedings under this section may, however, be stopped by the tenant tendering or paying into Court the rent and costs. (See sect. 212.)

possession
of their
property.

It frequently becomes an important question whether a landlord does not by his conduct waive a forfeiture. There have been numerous decisions on this question, for which the reader is referred to Woodfall's *Landlord and Tenant*, 11th ed. 294. Taking proceedings in ejectment amounts to a final election by the lessor to avail himself of the forfeiture. Hence the receipt of rent that would have accrued subsequent to the forfeiture would not be a waiver (*Doe v. Morecraft* v. *Mear*, 1 C. & P. 346) nor a distress for such rent (*Grimmond v. Moss*, L. R. 7 C. P. 360); nor the delivery of particulars of breaches complaining of non-payment of rent, together with other breaches. (*Tolman v. Portbury*, L. R. 6 Q. B. 245; aff. Ex. Ch. L. R. 7 Q. B. 344.)

What
amounts to
a waiver of
a right of
re-entry.

Under s. 14 of the Conveyancing and Law of Property Act, 1881, relief against forfeiture of leases for breach of covenant is freely given. For the conditions precedent for any action of ejectment based on the forfeiture see the same section.

Suits by heirs-at-law.—When the plaintiff in an action for the recovery of land is an heir-at-law, he must aver and be prepared to prove his descent through lawful marriage from the purchaser (as defined by 3 & 4 Wm. 4, c. 106, s. 2), and that all intermediate heirs between himself and the ancestor under whom he claims are dead without issue.

Essential
averments
where heir-
at-law is
plaintiff.

In such suits questions of births, marriages, deaths, and identity constantly come into controversy. It is not conceived to be within the scope of this work to dwell on these subjects, and in any suit of this kind recourse must be had to the several valuable works in which they will be found discussed.

Suits by devisees.—A devisee, in order to establish his claim, must prove—

1. That the testator was entitled in fee.
2. The regular execution of the will, or in certain cases the grant of probate under 20 & 21 Vict. c. 77, s. 61.
3. The death of the testator; and
4. The determination of the estates (if any) limited prior to the limitation in his favour.

Where
devisee
in fee is
plaintiff.

In the case of copyholds—

1. The seisin of the testator, of which his admittance and actual possession would be the best evidence.
2. The surrender by him to the use of his will in the case of testator's dying before the 12th of July, 1815. But it is unnecessary in the case of persons dying after that date (55 Geo. 3, c. 192).
3. The will itself, of which probate under 23 & 21 Vict. c. 77, will be sufficient evidence.
4. The devisee's own admittance or right to admittance.

Where
devisee of
copyholds
is plaintiff.

In the case of devise of leaseholds, the plaintiff must prove—

1. The title of the devisor, unless the defendant is estopped from disputing it. (See ante, p. 465.)

Where
devisee of
leaseholds
is plaintiff.

2. On and before the 1st of January, 1882, A. B. was seised in fee and in possession of the premises.

3. On the 1st of February, 1882, the said A. B. died so seised and intestate, whereupon :

Where
executors,
&c., are
plaintiffs.

2. The probate of the will.
 3. The assent of the executor to the bequest or devise.
- In the case of executors and administrators, the plaintiff must show—
1. The leasehold title of his testator.
 2. The testator's death.
 3. The probate or grant of administration.

The term vests in an executor at the death of the testator, and the executor may therefore recover on a claim dated between the time of the testator's death and the probate. Com. Dig. Adm. (B. 10).

Administration, when granted, relates back for some purposes to the intestate's death. In Ireland the doctrine of relation was established for the purpose of ejectment. (*Patten v. Patten*, Alc. & Nap. 493.) By 3 & 4 Wm. 4, c. 27, administration is made to relate back to death for the purposes of the Act. (See also title *Executors and Administrators*.)

The following are the usual defences to suits for the recovery of land by devisees, viz. :—

Common
defences to
actions by
devisees.

1. A disclaimer by the devisee.
2. Fraud and undue influence exercised over the testator.
3. Incapacity of the testator from infancy or coverture.
4. Incapacity from idiocy, insanity, or such mental aberration as would deprive the testator of the testamentary capacity. See judgment of Sir J. P. Wille in *Smith v. Tebbitt*, L. R. 1 Prob. & Div. 398.
5. Revocation of will by cancelling, burning, tearing, or destroying, *animo revocandi*.
6. Revocation by subsequent will, making a disposition of the property to another person.

Suits for recovery of possession by mortgagees.—Where the mortgagee is in possession after default, and the action is brought against him, the mortgagee has only to prove the execution of the mortgage, a demand of possession being in such case unnecessary. (*Doe d. Roby v. Maizey*, 8 B. & C. 767; and see note to *Keech v. Hall*, 1 Sm. L. Cas. 7th ed. 579.)

Mortgagee
suing to re-
cover the
mortgaged
premises.

If a third person is in possession by a title prior to the mortgage, then the mortgagee is in the position of an assignee of the reversion, and must show a title to oust him; thus in the case of a tenant from year to year it must be shown that he received a regular notice to quit.

A railway company exercising a power to mortgage the undertaking with all tolls, does not enable a mortgagee under that power to recover the railway. (*Myat v. St. Helen's Ry. Co.*, 2 Q. B. 364; and see *Gardner v. Lond., Chas. & Dover Ry. Co.*, L. R. 2 Ch. 201, 385.) A mortgagee of turnpike tolls cannot recover in ejectment, unless the power to mortgage includes land such as toll-houses and gates. (*Mytton v. Gilbert*, 2 T. R. 169.) As to suits for recovery of such property under 3 Geo. 4, c. 126, see *Thompson v. Lediart*, 4 B. & A. 137; *Watton v. Peasfold*, 3 Q. B. 757.

Where
execution
creditor is
plaintiff.

Suit by execution creditor for recovery of land.—The plaintiff must prove the judgment, the elegit, and the inquisition or return thereon. (B. N. P. 104.) If a third person be in possession of the land extended, it is sufficient on the part of the plaintiff to prove a *prima facie* title in the debtor, and it then lies on the defendant to show a title anterior to the delivery in execution. (*Evans v. Owen*, 2 C. & J. 71.) But by the

4. The estate descended to the plaintiff, his eldest son and heir-at-law.

5. After the death of the said A. B. the defendant wrongfully took possession of the premises.

27 & 28 Vict. c. 112, s. 1, since the 29th of July, 1864, "no judgment shall affect any land until such land shall be actually delivered in execution."

Suits by trustees of bankrupts.—See *Bankruptcy*.

Suits by parsons.—If the plaintiff does not claim in his character of landlord, he must deduce in his statement of claim his title, by stating that he was duly presented, instituted, and inducted, unless the defendant is estopped from disputing his title; and he need not show the title of his patron. (*Heath v. Prynne*, 1 Vent. 14.) Presentation by a corporation aggregate must be under the common seal. (Gibson's Codex, 794.) The parson cannot now eject a tenant at rack-rent under his predecessor, as by 14 & 15 Vict. c. 25, s. 1, such a tenant is entitled to hold until the expiration of the current year of the tenancy, and then quit without notice. *Semble*, a sentence of suspension, while in force, will prevent a parson maintaining this action. (*Morris v. Ogden*, L. R. 4 C. P. 687, 702, 703.) A defendant in such circumstances should, in his statement of defence, allege the suspension.

Suits by parsons.

In an action for the recovery of land of which the plaintiff has never been in possession, the statement of claim must allege the nature of the deeds and documents upon which he relies in deducing his title from the person under whom he claims, and a general statement that by assurances, wills, documents, and Crown grants in the possession of the defendants without further describing them, the plaintiff is entitled to the land, is embarrassing and liable to be struck out accordingly (*Philipps v. Philipps*, 6 Q. B. D. 127). If the plaintiff has not got the necessary information, he should apply for discovery (*Lyell v. Kennedy*, 8 App. Cas. 217).

Plaintiff's title must be set out in the claim.

No defendant in an action for the recovery of land, who is in possession by himself or his tenant, need plead his title unless his defence depends upon an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. Subject to that exception, it is sufficient for the defendant to plead that he is in possession (R. S. C. Ord. XXI. r. 21. *Danford v. McAnulty*, 8 App. Cas. 456).

Defendant need not plead his title.

The person in possession is made defendant in an action for the recovery of land and not his landlord. It has therefore been enacted by the 15 & 16 Vict. c. 76, s. 209, that all tenants shall on pain of forfeiting three years' rent, give notice to their landlords of any writ for the recovery of the land delivered to them and coming within their knowledge. By 11 Geo. 2, c. 19, s. 13, a landlord (which includes the heir, remainderman, devisee in trust, mortgagee, and the like), may be made, with the leave of the Court, a defendant to the action. The procedure is regulated by R. S. C. 1883, Order XII. rr. 25—28, by which it is provided, any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or judge appear and defend on filing an affidavit showing that he is in possession of the land either by himself or by his tenant.

Tenant is made defendant.

Any person appearing to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord.

Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or a judge to appear and defend, he shall enter an appearance according to the foregoing Rules

Rules of 1883 as to defendants in ejectment.

The plaintiff claims :—

- (1) Possession of the premises ;
- (2) Mesne profits from the 10th of February, 1882.

Action by public Trustees to recover Possession of Foreshore.

1. The plaintiffs are the trustees elected under and in pursuance of a private Act of Parliament, 36 Geo. 3, c. 101, intituled an Act for dividing, allotting, inclosing, draining, embanking, and improving the open and common fields, and other commonable lands and waste grounds within the several townships of M., W., B., and P. in the county of L.

2. Under the said Act certain foreshores and banks of the River Trent, in the said county, and the right to the possession thereof, became and are vested in the plaintiffs as such trustees as aforesaid, that is to say, certain banks and foreshores in the said county lying on the east side of the said river, and bounded on the east by certain lands of the defendant, being certain old inclosures or lands and grounds specified in the schedule annexed to an award dated the 1st of June, 1820, and made under and in pursuance of the said Act, and numbered in the said schedule as follows —.

3. The defendant has taken and retains possession of the banks and foreshores specified in the last paragraph hereof.

The plaintiffs claim possession of the said banks and foreshores.

Defence.

The defendant says :

He is in possession of the premises by himself or his tenant.

Rules of
1883 as to
defendants
in eject-
ment.

of this Order, intituled in the action against the party named in the writ as defendant, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action.

Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance or on a notice intituled in the action, and signed by him or his solicitor. Such notice shall be served within four days after appearance ; and an appearance where the defence is not limited as above mentioned, shall be deemed an appearance to defend for the whole.

Claim by Lessor against Lessee to re-enter on the demised Land for Breaches of Covenant.

1. The plaintiff is entitled to the possession of a house and premises called No. 17, High Street, Leeds, in the county of York, which were let by the plaintiff to the defendant for the term of twenty-one years from the 29th of September, 1883. The said letting was by deed, dated the 3rd of October, 1883.

2. The said deed contained covenants by the defendant to pay the annual rent of £100, payable quarterly, to repair the said house and premises, and to insure the same against fire, and not to underlet, and provided that if the defendant should fail to perform or observe any of the said covenants the said term of twenty-one years should determine and the plaintiff might thereupon re-enter upon the demised premises.

3. The defendant has not performed or observed any of the said covenants. Throughout the whole of the month of February, 1884, they were all broken.

The plaintiff claims possession, £50 for rent up to March 25, 1884, now in arrear, and mesne profits from the 25th of March, 1883.

Defence.

The defendant says that :—

1. He is in possession of the premises.

2. The plaintiff has not served on the defendant the notice required by the Conveyancing and Law of Property Act, 1881, section 14.

3. On the — of —, 18—, being the day before the commencement of the action, the plaintiff distrained on the defendant's goods on the demised premises for the rent due upon the 25th of March, 1883.

4. The breaches of covenant complained of were made before and did not, nor did any of them continue after the 23rd of March, 1883.

5. The plaintiff waived the performance of the covenant not to underlet by consenting to the defendant's request for permission to underlet on the 17th of October, 1883 (a).

(a) See *Griffin v. Tomlinson*, 42 L. T. 359, a very important case on the law of waiver of a forfeiture.

Action by a Lessor against Assignee of the Lease to recover Possession on Ground of Forfeiture.

1. By a deed dated the 10th of August, 1883, the plaintiff demised the Till-hill Farm, in the parish of St. Andrew, in the county of Bedford, to one C. D., from the 24th of June, 1883, for the term of nineteen years at the rent of £100 per annum, payable by instalments on the usual quarter-days.

2. The said deed contained covenants by the said C. D. for himself and his assigns to pay all taxes and assessments imposed upon the demised premises, and to conform to and observe all the by-laws of the — Rural Sanitary Authority, and to cultivate according to the rotation of crops therein mentioned, and a clause of re-entry authorising the plaintiff to re-enter on the demised premises on breach of any of the covenants.

3. On the 17th of August, 1883, the said term of nineteen years was assigned by deed to the defendant.

4. From that day until the present time the defendant had broken all the said covenants. He has not paid the poor rate, he has not observed the 14th by-law of the said Sanitary Authority, by which it is provided [*Set it out*], and he has cultivated according to the four-course shift and not according to the rotation of crops by the said lease provided.

The plaintiff claims possession and mesne profits from the — of —, 188—.

Action by Lessee of an Eyot for Recovery of the same.

1. On the 1st of August, 1874, one J. F. was seised in fee of an eyot or osier bed situate in the parish of C., in the county of O., and adjacent to the river Thames.

2. On the said 1st of August, 1874, the said J. F., by an indenture of that date, demised the said eyot or osier bed to the plaintiff for a term of twenty-one years from the 2nd of August, 1874, and the plaintiff on the said 2nd of August, 1874, entered into possession of the same.

3. On or about the 5th of May, 1875, the defendant unlawfully entered the lands so demised to the plaintiff as aforesaid, and ejected him therefrom.

The plaintiff claims :

- (1) Possession of the said eyot ;
- (2) £200 for mesne profits.

Defence.

The defendant says that :—

1. He is in possession of the premises by himself or his tenant.

2. On the 1st of July, 1873, the said J. F. agreed to let the premises to the defendant for twenty-one years at a rent, and in pursuance and part performance of the said agreement, the defendant took possession of the premises. The plaintiff had notice of the said agreement before the 1st of August, 1874.

Claim by Devisees for Recovery of Property devised.

1. K. L., by his will, dated the 4th day of April, 1870, devised all his lands in the county of Kent unto and to the use of the plaintiffs and their heirs, upon the trusts therein mentioned, and appointed the plaintiffs executors thereof.

2. K. L. died on the 3rd of January, 1878, and his said will was proved by the plaintiffs on the 4th day of February, 1878.

3. K. L. was, at the time of his death, seised in fee of a house at Sevenoaks, and two farms near thereto called respectively "The Home Farm," containing 276 acres, and "the Longton Farm" containing 700 acres, both in the county of Kent.

4. The defendant, soon after the death of K. L., unlawfully entered into possession of the house and two farms.

The plaintiffs claim :—

- (1) Possession of the house and two farms ;
- (2) Mesne profits of the premises from the death of K. L. till possession shall be given.

Defence.

The defendant says that :

1. The defendant is the eldest son of Thomas L., deceased,

who was the eldest son of K. L. in the statement of claim named.

2. By articles dated the 31st of May, 1827, and made previous to the marriage of K. L. with Martha his intended wife, K. L. in consideration of such intended marriage, agreed to settle the house and two farms in the statement of claim mentioned to the use of himself for his life, with remainder to the use of his intended wife for her life, and after the survivor's decease, to the use of the eldest son of the said K. L. on his wife begotten and the heirs of his body, with other remainders over.

3. The marriage soon after took effect.

4. The said Martha, the wife of the said K. L., died in the year 1875.

5. There was issue of the marriage an only son, Thomas L. and two daughters. Thomas L., on the 3rd May, 1864, executed a disentailing assurance, which was duly enrolled, and thereby conveyed the house and two farms to the use of himself in fee.

6. Thomas L. died on the 17th of June, 1872, intestate.

7. The defendant is in possession of the premises.

Action by Devisees for Recovery of copyhold Land.

1. J. N., by his will, dated the 7th of December, 1871, devised all his real estate unto the plaintiffs, upon the trusts in the said will mentioned, for the benefit of the plaintiff E. N. and appointed the plaintiffs executors of his said will.

2. J. N. died on the 22nd of March, 1876, and his said will was proved by the plaintiffs on the 1st of June, 1876.

3. J. N. was at the time of his death entitled to a copyhold cottage and premises, situate in the parish of H., in the county of M., and known as No. 4, P. Place, Hornsey.

4. The plaintiffs have been duly admitted to the said copyhold cottage and premises, as customary tenants of the manor.

5. After the death of the said J. N., the defendants entered into possession of the said cottage and premises.

The plaintiffs claim:

(1) Possession of the premises;

(2) Mesne profits from the 14th of June, 1876.

Grantee of the Reversion against Assignee of the Lease for Recovery of Land, with Claims for Damages for Non-repair and Breach of Covenant to yield up Possession.

1. By an indenture of lease dated the 25th of March, 1866, W. H. E. demised a certain farm and dwelling-house known as "Park Farm," in the parish of —, in the county of Nottingham, to E. S., for a term of twelve years from the said date; E. S. by the said indenture covenanted to repair the premises as therein mentioned, and at the end of the lease to yield up possession of the demised premises.

2. On the 1st of February, 1870, W. H. E., by deed, conveyed all his estate in the premises to the plaintiff.

3. By an indenture dated the 23rd of December, 1870, E. S. assigned all his interest in the said term to the defendant.

4. The defendant since the said 23rd of December, 1870, and up to the 25th of March, 1878, has neglected to perform the said covenant to repair. Particulars of dilapidations were delivered to the defendant before action.

5. The said term expired on the said 25th of March, 1878, but the defendant keeps possession of the said farm and dwelling-house.

The plaintiff claims :

- (1) £200 damages for breach of the covenant to repair;
- (2) £500 damages for breach of the covenant to yield up possession or mesne profits from March 25th, 1878;
- (3) Possession of the said farm and dwelling-house.

Defence.

The defendant says that :—

1. He has not neglected to perform the covenant to repair as alleged, or at all.

2. As to the 5th paragraph of the statement of claim, the defendant says that he was ready and willing and offered the plaintiff to yield up possession of the said farm and dwelling-house on the said 25th of March, 1878, but the plaintiff requested him to continue the possession thereof pending certain negotiations which were then being carried on between the

plaintiff and the defendant for a renewal of the defendant's tenancy. At the commencement of this action these negotiations were still pending.

Action by Mortgagee of Premises to recover Possession thereof from Trustee under Mortgagor's Liquidation.

1. By an indenture of mortgage dated the 29th day of May, 1877, R. B. H. demised to the plaintiffs the messuage and premises, called No. 100, High Street, Newcastle-on-Tyne, to hold for all the then unexpired residue wanting the last day thereof of a term of twenty-one years from the 25th of March, 1871, in the said messuage and premises, subject to the proviso for redemption therein contained.

2. On or about the 23rd day of December, 1877, the said R. B. H.'s affairs were liquidated by arrangement in the London Bankruptcy Court. The defendant is the trustee in the liquidation.

3. Before and at the time of the institution of the said proceedings, moneys were and are due on the security of the mortgage deed.

4. The defendant, on or about the 8th January, 1878, entered into and is still in possession of the said messuage and premises.

The plaintiffs claim :

- (1) Possession of the said messuage and premises ;
- (2) Mesne profits of the said messuage and premises from the time of his entering into possession.

Claim by Trustees of a Settlement for Recovery of Lands held by them on the Trusts, on account of Breaches of Covenant by the Lessee.

1. By indenture dated the 30th September, 1869, made between one Jane H., since deceased, and the defendant J. E., the said Jane H. demised a certain messuage and premises situate at —, and certain land at the back and side thereof, to the defendant J. E., as from the 29th day of September, 1869, for twenty-one years, at the yearly rental of £65.

2. The defendant J. E., by the said deed, covenanted during the term to repair the said messuage and premises, and in every three years of the said term to paint all the external wood

and ironwork, and in every seventh year to paint all the internal wood, iron, and stucco work of the messuage or tenement and premises twice over with good oil-colours, and also to repair within three months after notice in manner therein mentioned.

3. By the said deed a right of re-entry was reserved in case of the non-performance of the said covenants.

4. During the said term the said Jane H. died, and by her will devised to G. W. H., F. S. H., and H. M. H. her reversion of and in the said premises, upon the trusts therein contained, and also declared that the power of appointing new trustees should be exercised in the manner therein mentioned.

5. Afterwards the plaintiffs were duly appointed trustees of the said will in the places and stead of the said G. W. H., F. S. H., and H. M. H., and the said reversion became and was vested in the plaintiffs.

6. The following breaches of covenant have been committed. The defendant J. E. did not repair or paint the said messuage and premises according to the covenant; and though the plaintiffs, on the 1st of November, 1876, gave due notice to the defendant J. E. to repair within three calendar months from the date thereof, the defendant J. E. did not repair within the said time, and by reason of the premises, the said messuage and premises have become dilapidated. Full particulars of the dilapidations were given to the defendant J. E. before action.

7. The other defendants have been let into possession of parts of the demised premises by the said J. E.

The plaintiffs claim :

- (1) Possession of the premises ;
- (2) £500 damages for the said breaches of covenant ;
- (3) Mesne profits from the 2nd of February, 1877.

Claim by Descent.

1. In the year 1774, Benjamin Brown bought the estate of **Glengarry**, in the county of York, and died seised in fee in 1794.

2. By A. B., his first wife, he left issue, William and Susannah. William married S. W., and had issue Isaac and Lucy. William died seised in 1824, and a widower. Isaac died unmarried and without issue and seised in 1854, and Lucy died in infancy in

1824. After the death of S. W. William married M. W., and had issue George, who died unmarried, without issue and seised in 1855. The said Susannah died unmarried and without issue in 1840.

3. Benjamin Brown, by his second wife J. S., had issue John and Catherine. John died seised in 1856, a widower, and leaving issue Edmund, his eldest son, Penelope, Henry, and Felicia. Penelope, Henry, and Felicia are long since dead, without issue. Edmund died seised in 1861, leaving no widow and one child only, namely, James Brown, who died seised in November, 1883, without issue and unmarried.

4. Catherine, the daughter of Benjamin Brown, died in 1840, having married her husband C. S., and leaving one son, who died in or about the year 1865, unmarried and without issue.

5. Benjamin Brown was the son of Mary and Joseph Brown. After the death of Mary Brown Joseph Brown married E. A., by whom he had a son Timothy. The defendant claims to be the great-grandson of the said Timothy, and on the death of the said James Brown, in 1883, entered into possession of the said estate.

6. Joseph and Mary Brown had issue one other child only, namely, Bridget.

7. Bridget married A. B. in 1780, and died a widow in 1785, leaving O. B., her eldest son, her surviving. O. B. married E. E. in 1810, and died a widower in 1835, leaving P. B., his eldest son, him surviving. P. B. married I. I. in 1850, and died in 1873, a widower, leaving the plaintiff, his eldest son and heir-at-law.

8. All the persons above mentioned and deceased died intestate.

The plaintiff claims :

- (1) Possession of the said estate ;
- (2) Mesne profits from the 30th of November, 1883.

Claim by Nephew of the Purchaser on ground of Advancement.

1. In 1854 A. B. was, and continued to his death, seised of the copyhold farm of X., in the parish of Y., in the county of Z., for his own life only.

2. In 1855 A. B. procured a grant of the said farm from the lord of the manor to the plaintiff, his (A. B.'s) nephew, in remainder expectant on the death of A. B. to hold to the plaintiff for his absolute use and not in trust.

3. The said A. B. procured the said grant, intending thereby and in order to advance the plaintiff.

4. In 1880 A. B. died, and the plaintiff was admitted tenant on the Court rolls, but the defendant has wrongfully taken possession of the said farm.

The plaintiff claims :

- (1) Possession of the farm ;
- (2) Mesne profits from the 20th of December, 1880.

Rectification and Cancellation of Deeds and other Instruments (a).

Claims for Delivery and Cancellation of a Bill of Exchange obtained by Fraud.

1. On October 3, 1883, the plaintiff was induced by the fraudulent and false representations of the defendant to accept

(a) The Court of Chancery very early assumed jurisdiction to order the delivery up and cancellation of instruments which were void or voidable, and the rectification of settlements and other documents which by mistake or otherwise did not express the true intentions of the parties to them. But the exercise of this jurisdiction was discretionary.

Notwithstanding some early doubts, the Court would order instruments which were absolutely void, to be delivered up, unless the nullity of the instrument was patent upon the face of it, in which case it could neither throw a doubt on any title nor be used in anyone's hands to vex the plaintiff at law or otherwise, *Kemp v. Prior*, 7 Ves. 248. But see *Everitt v. Everitt*, L. R. 10 Eq. 405. The Court never interfered to cancel a voluntary deed, however imprudent it might be, unless there was some other objection, as fraud, oppression, or mistake, than its folly attributable to it, and absence of a power of revocation in a voluntary deed is no reason for ordering it to be cancelled, *Hall v. Hall*, L. R. 8 Ch. App. 430.

In regard to voidable instruments the Court refused to interfere at the suit of a plaintiff who had himself been guilty of fraudulent or illegal conduct. "He who comes into equity must come with clean hands." The cases in which the Court would set aside voidable instruments are classified in Mr. Snell's *Principles of Equity*, pp. 612, 613, as follows :

Where there was some actual fraud in the party defendant in which the party plaintiff had not participated.

Where there was some constructive fraud against public policy and the party plaintiff had not participated therein.

Where there was some constructive fraud against public policy and

Jurisdiction of Court of Chancery to order rectification of deeds, &c.

When Court will interfere.

and to deliver to the defendant a bill of exchange of that date for the sum of £500 drawn by the defendant.

2. The said representations were that the defendant had shipped twenty bales of silk in the s. s. *Arethusa* in the name of the plaintiff, which he had not done :

The plaintiff claims :

- (1) That the bill of exchange may be delivered up and cancelled ;
- (2) An injunction to restrain the defendant from negotiating the bill of exchange.

Action to Rectify an improper Settlement executed in Ignorance of its Effect by adding a Power of Revocation.

1. In the year 1871 the plaintiff A. B. was seised in fee of the Langley Estate, in the county of Rutland, and then worth £100,000.

2. At the same time the plaintiff A. B. was seised for his lifetime, with remainder to the plaintiff B. B., in tail male of

although the party plaintiff had participated therein, yet public policy would have been defeated by allowing the instrument to stand.

Where there was some constructive fraud in both parties, but they were not both of them in *pari delicto*.

When
Court will
order recti-
fication.

The Court of Chancery would also order the rectification of any instrument which by fraud, or mistake, or accident did not truly express the meaning of the parties. But it is important to note that in the case of marriage settlements the mistake must be common to both husband and wife. *Sells v. Sells*, 1 Dr. and Sm. 45. But in a recent case in which the settlement was of the wife's property and was of such a nature as to impose upon the husband the duty of fully explaining its effect to the wife (who had no professional assistance) rectification of the settlement was decreed at the instance of the wife upon the death of the husband upon her uncorroborated parol testimony. *Loxley v. Smith*, 15 Ch. Div. 655 ; and cf. *Finch v. Finch*, 23 Ch. Div. 267. In that case a father being seised in fee of a large estate, and having a small estate for life with remainder to his son in tail male, the father and his son executed a deed of conveyance to the father in fee of the small estate, and a deed of settlement of the large estate to the use of the father for life with remainder to the son for life with remainder to the eldest and other sons of the son successively in tail male. The deed contained no powers of jointuring widows or of raising portions for younger children. A joint power of revocation appeared in the draft as originally prepared by Counsel, but had been struck out. The father and son had each a wife and a large family, and each declared that he had been aware of the effect of the deed he would not have executed it. It was held that under the circumstances the deed must be rectified by adding a power of revocation, and with the plaintiffs' consent it was directed that a new settlement with all proper powers should be made under the direction of the Court.

the Wick Estate in the same county and then worth £8,000.

3. Thereupon the plaintiffs A. B. and B. B. executed an indenture dated the 1st of October, 1871, by which the Wick Estate was conveyed to the plaintiff A. B. in fee discharged of all estates in remainder, in tail or otherwise. The deed was duly enrolled.

4. On the same day the plaintiffs A. B. and B. B. executed an indenture of settlement whereby the Langley Estate was limited to the use of A. B. for life, with remainder to B. B. for life, with remainder to the eldest and other sons of B. B. in tail male. The said indenture contained no powers of jointuring widows or of raising portions for younger children. By mistake a power of revocation by the plaintiffs jointly which it was always intended to insert in the said indenture was struck out of the draft thereof and was omitted from the said indenture.

5. Neither of the plaintiffs was aware at the time of executing the said indenture of settlement of the effect thereof.

6. The defendants O. and P. are the trustees of the settlement.

7. The defendant R. is the eldest son of the plaintiff B. B. The defendants S. and T. are the only other sons of the plaintiff B. B.

8. The defendants U. and V. are the only sons of the plaintiff A. B. other than the plaintiff B. B.

The plaintiffs claim rectification of the settlement.

Action for the Rectification of a Settlement.

1. In 1865 a marriage was arranged between A. B. and the plaintiff.

2. By an agreement contained in two letters dated February 10th and 12th, 1865, it was agreed between C. B., the father of A. B., and D., the father of the plaintiff, that each should settle £10,000, on trust, for A. B. and the plaintiff successively for life, with remainder on the usual trusts for the children of the marriage.

3. By letter dated March 7th, 1865, from D. to Messrs. E. & Co., his solicitors, he instructed them to prepare a settlement.

4. A settlement dated April 25th, 1865, was executed upon

the marriage of A. B. and the plaintiff, accidentally omitting to give a life interest to the plaintiff after the life interest of A. B.

5. On May 20th, 1882, A. B. died.

6. The defendants H. and K. are the present trustees of the settlement.

7. The defendants L. M. and N. are the only children of the marriage.

The plaintiff claims rectification of the said settlement.

Release (a).

Defence of Release.

The cause of action herein was released by deed dated the [insert date of release here] and made between the plaintiff of the first part and the defendant of the second part.

A simple contract before breach released by parol.

How released after breach.

(a) A simple contract may *before breach* be discharged by parol, even *semble* where it is in writing, pursuant to the Statute of Frauds. But a contract in writing under the Statute of Frauds cannot be varied by parol. (*Goman v. Salisbury*, 1 Vern. 240; and see *Goss v. Nugent*, 5 B. & Ad. 65.) Nor can it be rescinded and another contract be substituted for it by parol. (*Noble v. Ward*, L. R. 1 Ex. 117; L. R. 2 Ex. 135. Ex. Ch.; and see *Hickman v. Haynes*, 44 L. J. C. P. 358.)

After breach the liability can only be discharged by a release under seal or by accord and satisfaction (B. N. P. 152; *Willoughby v. Backhouse*, 2 B. & C. 824), or by proof of a valid agreement substituting a new cause of action. (*Noble v. Ward*, *supra*.)

A cause of action accrued in respect of a tort can only be validly released by deed.

How far one debtor may be released without his co-debtor.

A release of the whole of a debt given to one of two or more joint or joint and several debtors discharges all of them, but receiving a portion of a debt from one of them, and putting an end to an action against such one, does not discharge the other or others. (*Watters v. Smith*, 2 B. & Ad. 889.) Nor does a qualified release of one co-debtor, as where the right is reserved to make him a nominal defendant with the others, release the others. (*Solly v. Forbes*, 2 B. & B. 38.) So where the remedy is reserved against the others. (*Willis v. De Castro*, 27 L. J. C. P. 243.) Or where on release of principal debtor the right against surety is reserved. (*Green v. Wynn*, L. R. 4 Ch. 204; *Batson v. Gosling*, L. R. 7 C. P. 9.) In the last two cases the so-called release is not strictly such, but a covenant not to sue. (*Ibid*.) This covenant formerly supported a plea of release on the ground of avoiding circuity of action. (*Ford v. Beech*, 11 Q. B. 853.)

Bankruptcy proceedings do not release co-debtors.

A discharge under the Bankruptcy Act, of one joint debtor or co-contractor does not release the other. This provision extends to cases of composition (*Megrath v. Gray*, L. R. 9 C. P. 216; *Dunn v. Wyman*, 51 L. J. Ch. 623) and to liquidation by arrangement, (*Ellis v. Wilmot*, L. R. 10 Ex. 10.) It has been held that a resolution for composition duly

Reply.

The plaintiff says that he was induced to sign the said deed of release by the fraudulent representation of the defendant.

Particulars of the said fraudulent representation :—

[Insert the effect of the alleged fraudulent representation].

Replevin (a).

1. *Claim in an Action of Replevin.*

1. On the 7th of August, 1880, the defendants unlawfully caused a distress to be levied on the plaintiff's goods in his

registered, though binding on creditors as against the debtor, does not release his surety. (*Ex parte Jacobs*, L. R. 10 Ch. 211.)

"The general words in a release are limited always to that thing or those things which were especially in the contemplation of the parties at the time when the release was given. But a dispute which had not emerged or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release." (*Per Lord Westbury, in London and South Western Railway Company v. Blackmore*, L. R. 4 H. L. 610.) And, acting upon this principle, when in consideration of certain payments by an executrix, persons interested in the estate gave a release of all claims on the estate to the executrix, and it being afterwards discovered that property in which the testator was entitled to a share, had during his life been sold at an under-value, the executrix instituted a suit to set the sale aside, and recovered therein a large sum of money as part of the testator's estate, it was held that the persons who gave the release were entitled to share in the money so recovered. (*Hall v. Turner*, 14 Ch. Div. 829. See also *Lindo v. Lindo*, 1 Beavan, 496, and *Eyre v. Gladstone* referred to in *Hall v. Turner*; *Hawkins v. Jackson*, 1 Mac. & G., 372.)

Where the releasee has obtained the discharge by fraud or under circumstances which render it void, such as drunkenness, &c., the plaintiff should in his reply set forth the facts, and should not rely merely on a denial of the release. Even before the recent alteration of the rules of pleading it was necessary to raise this answer by the replication. (*Wild v. Williams*, 6 M. & W. 490.)

(a) Where a person's goods have been taken under a distress, whether a distress for rent or damage feasant, he has a right to replevy his goods, that is to say he can get his goods back upon giving surties and entering into a bond conditioned to prosecute a suit against the person who seized the goods, and also conditioned to return the goods if a return be awarded. By the 19 and 20 Vict. c. 108, s. 65, the action of replevin can be commenced in the Superior Court upon the replevisor (the person whose goods have been distrained) giving security for such an amount as (1) shall cover the alleged rent or damage for which the distress was made; (2) the probable costs of the action in the Superior Court; and in this case the replevisor must undertake to commence his action within a week and prosecute it without delay, and unless judgment is obtained by default to satisfy the Court (that is, the Superior Court, for it would be otherwise if the suit were in the County Court) that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise was in question,

Limitation to the generality of a release.

Fraud, &c., in the obtaining of the release to be specially replied.

The right of replevying.

Nature of the replevin bond when action proceeds in Superior Courts.

premises, 10, Brook Street, Wigan, for the sum of £20, which they alleged was then due from the plaintiff to them for rent.

2. The plaintiff thereupon replevied the said goods, and gave the usual security to prosecute this action, and to return the said goods if a return thereof should be adjudged.

The plaintiff claims £100 damages.

2. *Claim against a Bailor upon a Replevin Bond.*

1. The defendant by his deed of the 1st of May, 1880, bound himself to pay to the plaintiff the sum of £50 unless one A. B. should within one week therefrom commence an action of replevin against C. D. in the Queen's Bench Division of the High Court of Justice for taking and unjustly detaining certain goods and chattels of the said A. B. and prosecute such action with effect and without delay, and should also make return of the said goods and chattels if return thereof should be awarded.

2. A return of the said goods and chattels was awarded against the said A. B., but he has not made it.

The plaintiff claims £50.

or that such rent or damage exceeded £20, and to make return of the goods if a return thereof should be awarded.

The procedure in a case which ultimately resolves itself into an action of replevin, will be as follows:—A's goods or cattle are taken by distress. A. goes before the registrar of the County Court and enters into a replevin bond to prosecute an action against the distrainer either in the County Court or the Superior Court, and upon executing this bond and giving security, he gets his goods or cattle back. In the replevin action, the replevisor is the plaintiff, and the distrainer is the defendant, and after the issue of the writ or plaint, as the case may be, the action proceeds in the ordinary way, the onus at the trial resting on the plaintiff to show that the defendant acted wrongfully in distraining his goods.

Parties who have signed the replevin bond are of course liable if there is any breach of its conditions. The plaintiff has the option of claiming either the specific amount of the bond or damages. If he does the former, and judgment goes by default, the judgment against the defendant is final, and no writ of enquiry need issue to assess the damages. But the defendant can come to the Court and apply for a stay of proceedings, and the Court will then refer it to the Master to ascertain what is actually due on the bond. On the other hand, when the plaintiff claims damages merely, and there is default on the defendant's part, the judgment is interlocutory and a writ of enquiry must issue. The practice in these respects has not been altered by the Judicature Acts. (*Dix v. Groom*, 49 L. J. Q. B. 430.)

The procedure in replevin.

Effect of defendant's default in action on replevin bond.

Rescission (a).

Defence of Rescission.

The contract was rescinded [*or, the defendant was exonerated by the plaintiff, as the case may be,*] before breach. Particulars are as follows :—An arrangement between the plaintiff and the defendant made verbally on the 15th of April, 1882 [*or, by letter from the defendant to the plaintiff and answer of the plaintiff, dated the 14th and 15th of April, 1882, as the case may be*].

Reward (b).

1. On the 1st of August, 1879, the defendant by advertisement in the *Standard* offered a reward of £100 to any person who should give such information as should lead to the detection of a person alleged in the said advertisement to have stolen certain property belonging to the defendant.

2. On the 1st of September, 1879, the plaintiff gave information to the defendant which led to the detection of the person who stole the said property.

The plaintiff claims £100.

(a) Rescission is the putting an end to a simple contract before breach by mutual consent.

A contract in writing, as required by the Statute of Frauds, may be *entirely rescinded* by parol; but it may not be *varied* by parol merely. This distinction is established by *Noble v. Ward*, L. R. 1 Ex. 117; 2 Ex. 135; 36 L. J. Ex. 91.

(b) Where the defendant promised a reward to whoever would give such information as would lead to the conviction of a felon, and the plaintiff gave the necessary information, it was held that the service rendered was a sufficient consideration for the promise, and that the plaintiff was entitled to recover the reward, although he was a constable and police officer of the district in which the felony was committed, (*See England v. Davidson*, 11 Ad. & E. 856; *Smith v. Moore*, 1 C. B. 438; *Turner v. Walker*, 6 B. & S. 871; L. R. 1 Q. B. 641.) In *Bent v. Wakefield Bank* (4 C. P. D. 1), Grove, J., commented upon the impolicy of allowing police officers to recover rewards at all, and decided that where the criminal surrendered himself the plaintiff was not entitled to the reward.

Rewards offered for recovery of stolen property may be recovered.

A person may advertise a reward for a return of stolen property, but if he puts in his advertisement a clause to the effect that no questions will be asked, he exposes himself to a penalty of £50, which can be recovered by a common informer in an action of debt. (See the 24 & 25 Vict. c. 96, s. 102.)

Defence.

1. The defendant does not admit that the plaintiff gave him any information.

2. If the plaintiff did give him some information the defendant was already in possession of all the material information which led to the detection of the person who had stolen the defendant's property.

Rights, Declarations of (a).*Action claiming Declaration of Intestacy.*

1. A., by her will, dated August 1st, 1883, bequeathed £100 to the defendant B., and devised her house and garden at

New rule
as to de-
claratory
judgments
larger than
old one.

(a) By Order XXV., r. 5, of the R. S. C. 1883, "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby; and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not."

This rule takes the place of s. 50 of the Chancery Procedure Act, 1853 (15 & 16 Vict. c. 86), now repealed, and at the same time extends its operation. The section referred to gave power to the Court of Chancery "to make binding declarations of right without granting consequential relief," while under the new rule the Court can make declarations of right "whether any consequential relief is or could be claimed or not."

Decisions
upon old
rule.

The decisions of the Court on the above section considerably restricted its operation: thus the Court refused to make a declaratory decree upon a special case in the lifetime of the tenant for life with regard to the interests of the parties in remainder (*Garlish v. Lawson*, 10 Hare, App. XIV.; and see *Bright v. Tyndall*, 4 Ch. D. 189; 25 W. R. 109), and where a testator by will gave copyholds and leaseholds to trustees upon trusts to correspond with the uses of the devised freehold, and by a codicil limited the freeholds differently after the death of the first tenant for life, but was silent as to the copyholds and leaseholds, it was held that during the continuance of the life estate the Court would not determine how far the ulterior limitations of the copyholds and leaseholds were affected by the codicil (*Langdale v. Briggs*, 8 D. M. & G. 428), nor would the Court make a declaratory decree to bind infants (*Widd v. Bing*, 8 D. M. & G. 633), nor in relation to a merely legal right (*The Trustees of the Birkenhead Docks v. Laird*, 4 D. M. & G. 732), nor as to a claim which might be made by another under circumstances which might or might not happen (*Jackson v. Turnley*, 1 Drew, 617).

The section has, however, received a more liberal construction in later cases, and in *Curtis v. Sheffield* (L. R. 21 Ch. D. 1; 30 W. R. 581; 51 L. J. Ch. 535; 46 L. T. 177) Jessel, M. R., said, "it is true that it is not the practice of the Court, and was not the practice of the Court of Chancery, to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decisions, or there are some other special circumstances to satisfy the Court that it is desirable

Higley, in the county of Buckingham, to B., upon trust, to block up all the rooms of the house (except four rooms, in which she directed that a housekeeper and his wife should be placed in occupation), and the coach-house for twenty years; and subject thereto upon trust for the defendant D. in fee; and she directed the defendant B. to visit the house and premises once in every three months, to see that the trusts were effectually carried out, and declared that if any trustee should neglect or refuse to carry out the trusts aforesaid, any real or personal estate given or intended to be given to him by the will should go to the defendant C.; and she appointed the plaintiff her executrix.

2. A. died on the 2nd of December, 1883, and the plaintiff has proved her will.

3. The plaintiff is heir-at-law of the said A.

4. B. has neglected and refused to carry out the trusts relating to the said house and garden.

The plaintiff claims a declaration that the said house and garden were not disposed of by the will of A., and that the legacy of £100 to the defendant B. is payable to him, and not to the defendant C., or that the rights of the parties may be declared.

at once to decide on the future rights. But where all the parties who in any event will be entitled to the property are of age, and are ready to argue the case, the reason of the rule departs, and it becomes a mere technicality. The reason of the rule is this, that the Court will not decide on future rights, because until the event happens it does not know who may be interested in arguing the question, and therefore may be shutting out parties who when the event happens may be entitled to succeed, but where they are all of age and every possible party is represented before the Court, as I said before, utility seems to say that there should be a power to determine their rights as is the case in Scotland and many other countries."

Future rights will be declared where all parties *sui juris*.

The ratio of the old rule as laid down by Jessel, M. R., in the preceding judgment would still appear to exist, and it is suggested that the new rule does not extend its operation so as to allow of a declaration of right such as that refused in *Webb v. Bing*, *supra*, being made, if all the parties are not and could not be before the Court. Nor is it probable that the rule has been extended with a view of allowing speculative questions as to title to be tried.

The probable intention of the new rule is no doubt to relax the strictness of the former rule as to declarations of future contingent rights, subject to the presence of parties according to the ruling of Jessel, M. R. (*supra*), and in other respects to have a declaration of right without any immediate present relief being claimed or without the plaintiff being in a position even to claim any such present relief.

Case for Declaration of Title, and for Administration of Estate.

1. T. W. H., late of —, by his last will, dated the 27th of March, 1872, appointed W. C. of —, and J. H. of —, his executors and trustees, and devised and bequeathed to them all his real estate, and the residue of his personal estate after bequeathing certain specific legacies, upon trust to sell the real and convert the personal estate into money, and out of the proceeds to pay his debts, funeral and testamentary expenses, and certain legacies, and as to the residue, to stand possessed thereof in trust for such of the children of F. T. of —, and such of the issue of his children who should be dead at the time of the testator's decease as should being males attain the age of twenty-five years, or being females attain that age or marry.

2. The testator died on the 3rd of December, 1882.

3. The said W. C. and J. H. predeceased him.

4. On the 15th of September, 1883, the defendant W. T. obtained letters of administration of the personal estate of the said testator, with the said will annexed, out of the C— District Registry of the Probate Division of the High Court of Justice.

5. The plaintiff and all the defendants, except J. M. D., are the children of the said F. T. mentioned in the 1st paragraph hereof, who have attained the age specified therein.

6. The greater portion of the testator's estate consists of real estate out upon mortgage, to which the defendant J. M. D. falsely alleging that he is the heir-at-law of the said T. W. H. and that the said T. W. H. died intestate, has made a claim. The said defendant has served notices upon the mortgagees of the said real estate, forbidding them to account to the plaintiff or to the defendant W. T. for the rents and profits, or to reconvey the same upon payment of the mortgage debt, and by reason of the claim of the said defendant and his action thereon, the plaintiff and the defendant W. T. are unable to realise the estate of the testator, and are much damaged.

The plaintiff claims:—

- (1) A declaration that the defendant J. M. D. has no legal or beneficial interest in the real estate of the said T. W. H.;

- (2) Or, if it be found that he has a legal interest therein, a declaration that he is only possessed thereof as a trustee for the plaintiff and the other defendants;
- (3) An order directing him to convey the said real estate to the plaintiff and the other defendants in accordance with the trusts of the said will;
- (4) Administration of the real and personal estate of the said T. W. H., and execution of the trusts of the said will.

Sale of Goods (a).

Buyer against Seller of Goods for delivering them Inferior to Contract.

1. The plaintiff has suffered damage by breach of a contract between the plaintiff and the defendant for sale and delivery by

(a) The rule may be taken to be that an ordinary contract of sale of goods need not be in writing: but this rule is subject to exceptions in two classes of cases. 1. By the 17th section of the Statute of Frauds it is provided that no sale of goods, wares, or merchandise (and by Lord Tenterden's Act, 9 Geo. 4, c. 14, it makes no matter though they may be intended to be delivered at some future time, or may not at the time of the contract be actually made, or fit or ready for delivery), for the price of £10 or upwards, shall be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or some note or memorandum of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorised. 2. By the 4th section of the Statute of Frauds no action shall be brought to charge any person upon any contract which is not to be performed within one year from the making thereof, unless the agreement or some note thereof is in writing signed by the party to be charged or his agent. This latter section is general in its terms, and is by no means confined to the sale of goods; in fact, it will seldom apply in such a case. It has been decided that it applies only to contracts, the complete performance of which is of necessity extended beyond the space of a year. (*Souch v. Straubridge*, 2 C. B. 815; *Knowlman v. Bluett*, L. R. 9 Ex. 1, and 307.) Therefore a contract which can be performed on either side within a year is not within the section. (*Donellan v. Read*, 3 B. & Ad. 899; and see on the subject 1 Smith's Leading Cas., 7th ed., 335, notes to *Peter v. Compton*.)

Generally contract of sale of goods need not be in writing.

Exceptions to this rule, under Statute of Frauds.

Reading s. 17 of the Statute of Frauds with s. 7 of Lord Tenterden's Act. The effect is that by the latter, the word "value" is substituted for the word "price" in the former.

Putting out of account the few contracts of sale that might come within the 4th section, the law regarding the sale of ordinary merchandise is essentially different where the value of the goods sold is less or more than £10. In the former case, the contract of sale is complete

Essential difference in the evidence of the

the defendant of 100 sacks of flour known as "seconds," at 35s. per sack.

2. Eighty sacks delivered were inferior to "seconds," and twenty sacks were not delivered.

Particulars of damage:—

80 sacks at 4s.	£16	0	0
20 sacks at 5s.	5	0	0
	£21	0	0

The plaintiff claims £21.

contract
where the
goods are
above or
below £10
in value.

as soon as the parties have come to a verbal agreement. A. enters a shop and sees a watch. He asks the price, and the shopman says £7. He says he will purchase, and the shopman agrees to sell it. The contract of sale is then complete, and if A., the purchaser, leaves the shop without taking with him the watch, or paying the price or any part of it, or signing any acknowledgment of the contract, the sale is nevertheless complete, the watch is his, remains in the shop at his risk, and he is liable to the shopkeeper for its price. But suppose in the case stated the shopman had fixed the value of the watch at £13, and A. had agreed to purchase and the shopman to sell at that sum, and nothing more had taken place, but A. had left the shop without the watch, without paying the price or any part, and without signing any memorandum of the contract—in that case there would have been no enforceable contract, the property in the watch would not pass to A., and he would not be liable in any action to the shopkeeper. To constitute a valid contract of sale of goods, wares, or merchandise which are above the value of £10, one or more of three things must happen. Either the purchaser or his agent must sign some memorandum of the contract, or he must pay the price or part of it, or give some earnest to bind the bargain, or he must accept and actually receive the goods. There are to be found in the books an infinite number of decisions upon what constitutes a good satisfaction of these conditions—the effect only of which can be given here.

What the
memoran-
dum must
contain.

The memorandum in writing.—The note of the contract upon which reliance is placed need not be made at the time the contract is entered into, though it must be made before action brought (*Hill v. Bament*, 9 M. & W. 36); and several documents, if sufficiently connected the one with the other by internal evidence, will constitute a good memorandum within the statute. (*Jackson v. Lowe*, 1 Bing. 9; *Sunderson v. Jackson*, 2 B. & P. 238; *Warner v. Willington*, L. J. 25 Ch. 662; *Burton v. Rust*, L. R. 7 Ex. 279.) The note or notes which make up the memorandum must contain all the terms of the agreement. (*Knucorothy v. Schofield*, 2 B. & C. 947.) It or they must contain the names of both the contract parties or their agents (*Williams v. Brynes*, 1 Moo. P. C. N. & 154, 198; *Vandenbergh v. Spooner*, L. R. 1 Ex. 316), the subject-matter of the contract, and the price and mode of payment if agreed upon. Where it appears by parol that the price has been agreed upon, and it is omitted in the note of the contract, the written memorandum is imperfect, and cannot be given in evidence. (*Elmore v. Kingrate*, 3 B. & C. 583; *Goodman v. Griffiths*, 1 H. & N. 574; L. J. 26 Ex. 145.) But where no price was really agreed upon, the contract will be good, and a reasonable price will be presumed. (*Hoadley v. McLain*, 10 Bing. 482.)

The effect
of the omis-
sion of the
price from
the note.

Buyer against Seller of Goods for not delivering.

1. The plaintiff has suffered damage by breach of contract for sale and delivery by the defendant to the plaintiff of 100 tons of Scotch pig-iron at £5 per ton to be delivered on rail at Middlesbrough on the 15th March, 1882.

It has been stated that a good memorandum within the statute can be made up of several documents, as where there is an unsigned memorandum containing the order, and then a letter (not necessarily addressed to the other party to the contract (*Gibson v. Holland*, L. R. 1 C. P. 1) signed by the defendant, in which he refers to the memorandum. (*Saunderson v. Jackson*, 2 B. & P. 238; *Burton v. Rust*, L. R. 7 Ex. 1, 279, Ex. Ch.) And it has even been decided that where the vendee wrote a letter to the vendor, in which, *after referring to all the essential terms of the contract*, he stated he had not received and declined to have the goods, because they had been damaged by the carriers, there was here a sufficient note in writing, notwithstanding the repudiation (*Bailey v. Seccring*, 9 C. B. N. S. 843; L. J. 30 C. P. 150; *Wilkinson v. Evans*, L. R. 1 C. P. 407); but the plaintiff cannot avail himself of a subsequent letter from the defendant, in which, though he recognises the order, *he disaffirms or adds to the terms of the memorandum*. (*Wooper v. Smith*, 15 East, 103.)

Where the note is made up of several documents.

As to the signature to the note, it is enough if it is signed by the defendant (*Laythorp v. Bryant*, 2 N. C. 735); and it makes no difference that there is no remedy against the party who does not sign. (*Allen v. Bennett*, 3 Taunt. 169.) It is quite immaterial where the signature is placed in the document, provided it is so introduced as to govern and authenticate every material part. (*Hubert v. Turner*, 4 Scott, N. R. 486; *Caton v. Caton*, L. R. 2 H. L. 127.) *Durrell v. Evans*, 1 H. & C. 174; L. J. 31 Ex. 337, is a strong case. There the only signature of the defendant was his name written by the plaintiff's agent on the top of a sale note, the contents of which were known to the defendant at the time, and subsequently altered at his request, and it was held that this was a good signature within the statute. Where a person is in the habit of printing instead of writing his name, that will be a sufficient signature. (*Saunderson v. Jackson*, 2 B. & P. 238; *Schneider v. Norris*, 2 M. & S. 286.)

As to signature.

What signature to the note is sufficient.

A signature by a duly authorised agent is by the express words of the section enough. It is not necessary that the agent should have the authority of his principal by a written instrument (*Graham v. Mutton*, 5 N. C. 603; 7 Scott, 769); but an agent, to bind the defendant by his signature, must be some third person, and not the other contracting party. (*Kurbrother v. Simmons*, 5 B. & A. 333; *Sharman v. Brandt*, L. R. 6 Q. B. 720, Ex. Ch.) In the case of a sale by auction, which is within the section, the auctioneer becomes the vendee's agent after his bid is accepted; and if he then, as will usually be the case, writes down the vendee's name in the catalogue opposite the lot, together with the price bid, it is a good memorandum. (*Emmerson v. Heelis*, 2 Taunt. 38; *Kenworthy v. Schofield*, 2 B. & C. 945; *Pierce v. Corf*, L. R. 9 Q. B. 210). But where the conditions of sale are not annexed or referred to in the catalogue, signing the buyer's name in the catalogue is not a compliance with the statute. (*Hinde v. Whitehouse*, 7 East, 558; *Pierce v. Corf*, L. R. 9 Q. B. 210.) Where the broker is the agent of both parties, as he generally is, he may bind them by signing the same contract on behalf of the buyer and seller, and his signature to the bought or sold

Signature by an agent.

Auctioneer the agent of both parties at a sale.

2. The defendant did not deliver any [or, — tons, as the case may be] of the said iron.

Particulars of damage:—

Loss of profit at £1 per ton on 100 tons, £100.

The plaintiff claims £100.

How far a broker can bind buyer and seller.

note will constitute a sufficient memorandum within the statute. (*Parton v. Crofts*, 13 C. B. N. S. 11; L. J. 33 C. P. 189.) There has been some controversy as to whether the real contract is contained in the bought and sold notes signed by the broker, and sent to the buyer and seller respectively, or in the entry which he makes in his book. (See *Hegman v. Neal*, 2 Camp. 337; *Thornton v. Newe*, M. & M. 43; *Sieccwright v. Archibald*, 17 Q. B. 124; L. J. 20 Q. B. 538; *Thompson v. Gardiner*, 1 C. P. D. 777.) Where there is a material variance between the bought and sold notes, and the broker has not signed the contract in his book, there is no binding contract (*Grant v. Fletcher*, 5 B. & C. 436; *Gregson v. Ruck*, 4 Q. B. 737); and if the two principals agree in the broker's presence, and the broker's note does not correspond with the terms agreed upon, then there is no written contract by an agent lawfully authorised, and a party who did not assent to the alteration is not bound. (*Pitts v. Beckett*, 13 M. & W. 743.)

Acceptance and actual receipt required.

[Acceptance and receipt within the statute.]—In the case of goods above the value of £10, failing a note in writing evidencing the contract there must be part payment or a delivery of the goods by the vendor with the intention of vesting the right of possession in the vendee, and an actual receipt by the latter with the intention of taking to the possession as owner. (*Phillips v. Bistolfi*, 2 B. & C. 513.) Acceptance without delivery or something tantamount to delivery of the goods, as delivery of the key of the warehouse where they are at the time (*Chaplin v. Rogers*, 1 East, 192, 195) is insufficient; but the acceptance may be prior to the actual receipt, and need not be contemporaneous with or subsequent to it. (*Cusack v. Robinson*, 1 B. & S. 299; L. J. 30 Q. B. 261; *Kershaw v. Ogden*, 3 H. & C. 717; L. J. 34 Ex. 159.) Where a joint order for several classes of goods is given, the acceptance of one class is a part acceptance of the whole under this section (*Elliot v. Thomas*, 3 M. & W. 170); and acceptance of part is sufficient, although the rest are not even made. (*Scott v. Eastern Counties Rail. Co.*, 12 M. & W. 33.) The delivery of a sample, if considered to be part of the thing sold, is a sufficient acceptance (*Hinde v. Whitehouse*, 7 East, 588); but it is otherwise where it is a sample merely, and forms no part of the bulk. (*Cooper v. Elston*, 7 T. R. 14.)

When acceptance of part is sufficient.

There may be an acceptance though buyer can still object to the quality, &c.

Constructive acceptance by acquiescence.

After some discussion, it seems to be finally settled that there may be an acceptance and delivery of goods within the statute, although the buyer still has a right to object to the quantity or quality of the goods. (*Kibble v. Gough*, 38 L. T. N. S. 704; following *Morton v. Tibbitt*, 15 Q. B. 429; L. J. 19 Q. B. 382.) There may be an acceptance, although the vendee has had no opportunity of examining all the goods; and equally there may be an acceptance, although it is open to the purchaser to dispute the terms of the contract as alleged by the vendor. (*Timkinson v. Straight*, 17 C. B. 697; L. J. 25 C. P. 85.) There may also be a constructive acceptance by acquiescence. Thus, where goods were sent by a named carrier, and a letter of advice was forwarded to the vendee, stating that the credit was three months, and the goods after arrival were seen by him in the warehouse of the carrier, when he told the carrier that he refused to take them, but made no communication

Creditor against Principal Debtor and his Surety severally on a Guarantee for Goods sold.

The plaintiff's claim is against the defendant X. as principal, and against the defendant Y. as surety, for the price of goods sold and delivered by the plaintiff to X. on the guarantee by Y. dated the 30th of October, 1883.

whatever to the vendor till after five months, it was held that this was evidence of acceptance and actual receipt (*Bushel v. Wheeler*, 15 Q. B. 442); so dealing with a bill of lading as if the person were owner of the property is evidence of the same thing. (*Meredith v. Meigh*, 2 E. & B. 364; L. J. 22 Q. B. 401.) As to what constitutes a good acceptance, see also *Rotide v. Thwaites*, 6 B. & C. 388; *Rayner v. Grote*, 15 M. & W. 359; *Martin v. Wallis*, 6 E. & B. 726; L. J. 25 Q. B. 369; *Elmore v. Stone*, 1 Taunt. 458.) But there can be no acceptance and receipt by the purchaser while the vendor's lien remains, for the vendor's lien necessarily supposes that he retains possession of the goods (*Morton v. Tibbett*, ante; *Carter v. Tinsaint*, 5 B. & A. 855); and delivery of goods to a wharfinger or agent who has been accustomed to forward goods from the plaintiff to defendant, and a delivery by him to the carrier, is not an acceptance, the carrier having no authority (though named by the vendee) to accept the goods for him, but only to receive them for the purpose of being carried. (*Hanson v. Armitage*, 5 B. & A. 557; *Meredith v. Meigh*, ante.) So where goods bought abroad were delivered at a foreign port on board a ship chartered by the purchaser, this was held to be no acceptance. (*Acebal v. Lery*, 10 Bing. 376; see also *Baldry v. Parker*, 2 B. & C. 37; *Bentall v. Burn*, 3 B. & C. 423; *Mahberley v. Shepherd*, 10 Bing. 99.)

No acceptance while vendor's lien remains.

But possession may be given up, and the vendor's lien extinguished, although the goods have not left the vendor's premises (*Jacobs v. Latour*, 2 Moo. & P. 205), as when the vendor begins to hold as the servant or agent of the purchaser (*Cottle v. Snowdon*, 30 L. J. Ex. 310).

Earnest or part payment.—Where there is no note in writing of the contract, or no acceptance and receipt of the goods, there must be an actual payment of some amount or other, or some pledge given to make the bargain of sale binding. Customary forms of concluding bargains, as when the purchaser draws the edge of a shilling across the hand of the vendor and returns the money into his own pocket, are not equivalent to earnest or part payment within the statute (*Blenkinsopp v. Clayton*, 7 Taunt. 597); and a bargain that the vendor shall take in part payment a debt due from him to the vendee is not in itself a sufficient part payment to dispense with writing, no money having in fact passed nor receipt for the debt been given by the vendee. (*Walker v. Nussey*, 16 M. & W. 302. But see *Spargo's Case*, L. R. 8 Ch. App. 407.)

To constitute a part payment money must actually pass.

Where the contract of sale is one within the Statute of Frauds, and the statute has not been complied with, the defendant must specially raise the defence of the statute in his statement of defence. (See Order XIX. r. 15; *Clark v. Cullow*, 46 L. J. Q. B. 53).

Vendor's duty.—In all contracts of sale it is the vendor's duty to hold the goods in readiness for delivery, but unless the contract itself provides that the vendor shall deliver, the buyer is bound to fetch the goods. (2 Kent Com. 505.) Where the contract provides that the vendor has to deliver, he is bound to do so on pain of being sued for

Vendor not generally bound to deliver.

Particulars:—

1883.	30th Oct.	Goods	£50 0 0
"	3rd Nov.	"	50 0 0
"	17th Dec.	"	50 0 0
1884.	5th Jan.	"	50 0 0
Amount due			£200 0 0

For claim against a surety for price of goods, see pp. 302-3.

But may be by agreement.

The time of delivery is not generally of the essence of the contract.

When delivery by the vendor dispensed with.

Effect of purchaser's insolvency.

breach of contract. Where the contract fixes the place of delivery, the vendor is not bound to deliver elsewhere, nor indeed is the vendee bound to accept elsewhere; but if the vendor is to deliver and the contract does not specify where the delivery is to take place, he is not bound to deliver or offer to deliver till the place of delivery is notified by the vendee. (*Armitage v. Insole*, 14 Q. B. 728.) As to the time within which delivery must be made when the contract is silent, it has been said that time is not generally of the essence of a contract for the sale of goods, unless expressly made so by the contract (*Martindale v. Smith*, 1 Q. B. 839; *Coddington v. Paleologo*, L. R. 2 Ex. 193); but in several cases it has been held to be. (See *Parker v. Rawlings*, 4 Bing. 280; *Wimhurst v. Deeley*, 2 C. B. 253. Cf. *Brandt v. Lawrence*, 1 Q. B. Div. 344.)

Sometimes the necessity of delivery or further delivery by the vendor is dispensed with by reason of the vendee's refusal to accept, or declaration that he will not accept. In such a case it is said that the true question is whether the act or conduct of the party evinces an intention no longer to be bound by the contract. (*Freeth v. Burr*, L. R. 9 C. P. 208.) It has been held, however, that where goods are to be delivered by the defendant to the plaintiff in twelve equal monthly parcels, the omission of the plaintiff to send for the whole of the first parcel as agreed does not exonerate the defendant from delivering the remaining parcels (*Simpson v. Crippin*, L. R. 8 Q. B. 14); when the delivery was to be by two equal parcels, the defendant was held not to be released from the delivery of the second parcel by reason that the plaintiff had refused to pay for the first in accordance with the contract. (*Freeth v. Burr*, *supra*. But in that case the circumstances were very special.)

Where there is a contract for the sale of goods to be delivered by instalments the price of each instalment being payable on delivery, and the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, and that he does not intend to go on with the contract, the seller is justified in repudiating the contract. (*Bloomer v. Bernstein*, L. R. 9 C. P. 588.) As to what amounts to such a declaration of insolvency by the purchaser as entitles the vendor to refuse further delivery, see *The Phoenix Bessemer Steel Co.*, 4 Ch. D. 108.

Where goods are to be delivered at a future day, the damages for breach of contract are the difference between the contract price and the market price of the goods on the day when they ought to have been delivered. (*Gainsford v. Carroll*, 2 B. & C. 624; *Valpy v. Oakley*, 16 Q. B. 341; L. J. 20 Q. B. 380.) If no difference is proved between the contract and market prices, the damages must be nominal. (*Valpy v. Oakley*, *supra*.)

Action against Vendor for not accepting Delivery.

1. The plaintiff has suffered damage by breach of the defendant's contract to purchase and accept from the plaintiff 50,000 lbs. of black yarn, second quality, at 2s. 5d. per lb., to be delivered and accepted by five monthly instalments, each of 10,000 lbs., the first instalment to be delivered on January 1, 1883, at Hull.

When the price has been paid, the measure of damages is the market price without deducting the contract price; and the same is the rule where the payment is by bills which are outstanding. (*Ibid.*) If the buyer, at the request of the seller, forbears to enforce the contract at the time the goods ought to be delivered, but afterwards does so, the measure of damages is the difference between the contract price and the market price when the buyer so enforces the contract, *i. e.*, by buying the goods in the market. (*Ogle v. Vane*, L. R. 2 Q. B. 275; aff. L. R. 3 Q. B. 272. See also *Tyne v. Rosedale, &c. Iron Co.*, L. R. 8 Ex. 305.) If a ship is ordered to be made, or is left for repair, and not delivered at the agreed time, the measure of damage is *prima facie* the sum which would have been earned by the ship in the ordinary course of trade since the period when it should have been delivered. (*Fletcher v. Tayleur*, 17 C. B. 21; L. J. 25 C. P. 65; *Cory v. Thames Ironworks Co.*, L. R. 3 Q. B. 181.) See generally on the question as to the measure of damages, *Elbinger, &c. v. Armstrong*, L. R. 9 Q. B. 473; *Vicars v. Willcocks*, 2 Sm. Lead. Cas., 7th ed., 534, and notes; Mayne on Damages, 4th edition.

Measure of damages where vendor has failed to deliver.

Duty of the vendee to accept delivery.—If the purchaser refuse to accept delivery of the goods when made according to the terms of the contract, he is liable in an action for damages. In order to charge the purchaser where a tender of the goods is necessary, it must be made at a reasonable time and place, and be such as to afford him opportunity of examining and receiving the goods. Thus, a tender of articles in a closed cask so as to prevent inspection, or at the defendant's warehouse at a late hour after it is shut up, will not be good, though in the latter case, if the defendant happens to be there, and is able to examine and receive them, it will not be bad merely on account of the lateness of the hour. (*Isherwood v. Whitmer*, 10 M. & W. 757; *Startup v. MacDonald*, 6 M. & Gr. 593.) The tender must not be of a larger quantity than was bought. Thus, if the buyer give a limited order for certain specified goods, and the seller sends these and others from a distant place in one package charged at a lump sum, the consignee may refuse the whole. (*Lery v. Green*, 8 E. & B. 575; L. J. 27 Q. B. 111; aff. Ex. Ch. 1 E. & E. 969; L. J. 28 Q. B. 319). Equally where a joint order is given for several articles the contract is entire, and the purchaser may refuse to accept one unless the others are delivered. (*Champion v. Short*, 1 Camp. 53.) Where the defendant instructed the plaintiff to buy for him 500 tons of sugar, "50 tons more or less of no moment if you are enabled to get a suitable vessel," and the plaintiff bought 400 tons, it was held that the defendant was not bound to accept the 400 tons. (*Ireland v. Livingston*, L. R. 5 Q. B. 516, Ex. Ch.) Where goods are sold at "about" a certain quantity, "more or less," the latter words are intended to provide for only a small excess. (*Cross v. Eglin*, 2 B. & Ad. 106; *Macdonald v. Longbottom*, 1 E. & E. 977; L. J. 28 Q. B. 293, and also 29 Q. B. 256.) Where the contract limits the time for

Purchaser bound to accept delivery.

What tender of the goods is sufficient.

If tender of a larger quantity purchaser may refuse the lot.

So where a less quantity tendered.

2. On the first of May, 1883, the plaintiff tendered, but the defendant refused to accept, the fifth instalment of 10,000 lbs.

Particulars of damage :—

Loss of profit, at 2d. per lb. on 10,000 lbs. £83 6s. 8d.

The plaintiff claims £83 6s. 8d.

delivery the buyer cannot refuse a good tender of the goods made within the proper time because a tender of goods inferior to sample had been previously made.

Partial breach of contract to deliver does not generally justify a refusal to receive.

When it is the purchaser's duty to take away the goods.

When time is of the essence of the contract, which, in the absence of special agreement to that effect, is seldom the case, the defendant need not accept delivery of goods tendered after the time. (See *Hoare v. Revie*, 5 H. & N. 19; L. J. 29 Ex. 73; *Coddington v. Paleologo*, L. R. 2 Ex. 193; *Bond v. Lunn*, 1 Q. B. Div. 344.) The general rule, however, is that a partial breach by the plaintiff of his contract to deliver does not justify the defendant in afterwards refusing to accept (*Chaschky v. Flegg*, 4 B. & S. 296; L. J. 32 Q. B. 385; *Simpson v. Coppin*, L. R. 8 Q. B. 14); but where the sale is by sample, and the bulk tendered does not correspond with the sample, the purchaser need not accept (*Holmes v. Watson*, L. R. 7 C. P. 438, 451; and so where the sale is an executory one, if something not in existence at the time, and to be made, the purchaser may refuse to receive, or even afterwards return it if it does not correspond with the description of article ordered.

Frequently a tender is not necessary, as where nothing was said on the subject in the contract. It is then the purchaser's duty to take away the goods, and it is enough that the vendor is ready and willing to deliver to him when required. Again, if the defendant notifies his intention to refuse, and fails to deliver goods ordered to be made, then, if the plaintiff has not proceeded to complete the contract on his part, and may show this under an alleged refusal to accept, although the goods are not ready for delivery, and could not be delivered, for the plaintiff is thereby discharged from proceeding further. (*Gort v. Ashberg*, 12 Q. B. 17; *Q. B. 127, 144*; L. J. 20 Q. B. 460.) A sale of goods on arrival, or on arrival in a particular ship, is a contract for a sale of goods at a future, perishable sale for the double condition of the arrival of the ship and the goods being on board; but it is not a warranty by the seller that the goods will arrive (*Bond v. Niffen*, 2 Camp. 326; *S. v. M. v. M.*, L. R. 5 Q. B. 429; aff. L. R. 7 Q. B. 139); but where the contract is for the sale of goods now on passage and expected to arrive by a certain date, it is a warranty on the safe arrival of a certain ship, or a particular one on the arrival of the ship only. (*Grimes v. Fenn*, 2 C. B. N. S. 681; L. J. 27 C. P. 29; *Hall v. Ranson*, 4 C. B. N. S. 57; L. J. 27 C. P. 189.)

Effect of a sale of goods on arrival of a particular ship.

Warranty on sale.

There is implied in the contract of sale a warranty by the vendor that at the time of the sale he has taken what he has no title to the thing sold and sold it as owner, he thereby warrants his ownership. But if the vendor is selling as a sheriff, trustee, pawler, clerk, or the like, and does not warrant against his title.

If the purchaser has an opportunity of inspecting the goods before sale, a warranty on the part of the vendor, fraud apart, is implied as to their genuineness or quality. But the maximum *contract emptor* has no application when the purchaser has no opportunity of inspecting. Under a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must be salable or merchantable in the fact that description (*Edwards v. Jett*, L. R. 3 Q. B. 197) and on the sale of an article for a specific purpose there is an implied warranty by

Defence and Counter-claim.

Defence.

The defendant says that :—

1. On the 1st of February it was in writing agreed between the plaintiff and the defendant that the delivery of the fifth and last instalment of the yarn should be made on the 5th of April, 1883, and not on the 1st of May, 1883, as previously agreed.

2. The plaintiff did not deliver the said instalment, or any part thereof, on the 5th of April, 1883, or at all until the 1st of May, 1883, when he tendered the said instalment.

Counter-claim.

The defendant says that :—

1. He repeats the allegations in paragraphs 1 and 2 of the statement of defence.

2. Before and on the 1st of February, 1883, the plaintiff had notice that the delivery of the fifth instalment on the 5th

the vendor that it is reasonably fit for the purpose, and there is no exception as to latent undiscoverable defects. (*Randall v. Newson*, 2 Q. B. Div. 102; *Nusseuvanjee v. Gregson*, L. R. 4 Ex. 49.)

But where the contract was for the sale and purchase of "oats" by sample, and the purchaser agreed to give what would have been a very high price unless they were old "oats," they being in fact new "oats," it was held that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract. (*Smith v. Hughes*, L. R. 6 Q. B. 597.)

Mistake.

As to the extent and limits of the right of an unpaid vendor to stop the goods in transit when the purchaser becomes insolvent, see *Exp. Gibbes*, 1 Ch. Div. 101; *Bollor v. L. & Y. Rail. Co.*, L. R. 1 C. P. 431; *Exp. Watson, re Love*, 5 Ch. D. 35; *Merchant Bank v. Phoenix Bessemer Steel Co.*, 5 Ch. Div. 205; *Exp. Barron*, 6 Ch. Div. 783; *Grice v. Richardson*, 3 App. Cas. 319; and *Kemp v. Fulk*, 7 App. Cas. 573.

Stoppage in transitu.

Although the purchaser of a chattel takes it as a general rule subject to what may turn out to be informalities in the title, by a purchase in market overt, the title obtained is good against the whole world except the true owner claiming *after* he has prosecuted the thief to conviction. And where the original owner parts with the chattel to A. upon a *de facto* contract, though there may be circumstances which enable that owner to set aside the contract, a *bonâ fide* purchaser from A. will obtain an indefeasible title. (*Cundy v. Lindsay*, 3 App. Cas. 459.) As goods *bonâ fide* bought from a thief become the property of the purchaser until the original owner prosecutes the thief to conviction, on restitution to the original owner, the purchaser cannot claim the cost of keeping or feeding the chattels. (*Walker v. Matthews*, 8 Q. B. Div. 731.)

Passing of property.

of April, 1883, was necessary to enable the defendant to complete a contract for the sale of yarn, which he had entered into with X. Y., and that the defendant had agreed to pay X. Y. £100 as liquidated damages if he should fail to perform his contract with him.

3. By reason of the plaintiff's failure to deliver on April 5, 1883, the defendant was unable to perform his contract with X. Y., and was compelled to pay X. Y. £100 as and for liquidated damages.

Particulars of damage :—

Paid X. Y.	£100	0	0
Loss of profit on yarn resold to X. Y., 10,000 lbs. at 2d.	83	6	8
	£183	6	8

The plaintiff claims £183 6s. 8d.

Reply.

As to the defence :—

1. The plaintiff joins issue.

As to the counter-claim, the plaintiff says that :—

1. He did not agree to deliver the fifth instalment on the 5th of April, or at all before May 1, 1883.

2. If he did so agree, the defendant, on the 4th of April, 1883, requested him to postpone delivery until further orders. The defendant gave no further orders, and the plaintiff accordingly delivered the instalment on May 1, 1883.

3. The plaintiff had no notice at all before action of the alleged contract with X. Y.

4. The plaintiff does not admit the alleged contract with X. Y., or that the defendant paid or was compelled to pay X. Y. £100, or any other sum for damages for breach of contract.

Action against Purchaser for not accepting Delivery of Part, and for Price of Part accepted.

1. On January 1, 1883, the defendant purchased of the plaintiffs 50 tons of sperm-oil, at £30 each, half to be deli-

vered on January 15, 1883, and the other half on February 1, 1883.

2. On January 15, 1883, the plaintiffs delivered 25 tons of the oil to the defendant, and he accepted it.

3. On January 20, 1883, the defendant in writing informed the plaintiffs that he would not accept the remaining 25 tons of oil if it should be tendered.

4. On February 1, 1883, the plaintiffs sold the 25 tons of oil (which the defendant refused to accept) for £625, the then market price.

The plaintiffs claim £750, price of the oil delivered, and £125 damages for loss upon the resale of the oil refused by defendant, making in all £875.

Defence.

The defendant says that :—

1. The fifty tons of oil were warranted equal to a sample.

2. On delivery of 25 tons delivered on January 15, 1883, they were inferior to sample, and the defendant refused to accept the same, and gave notice to the plaintiffs that they remained on the defendant's premises at the plaintiffs' risk.

3. The plaintiffs refused to deliver oil according to sample on February 1, 1883, but insisted that they would deliver oil of the same quality as that sent on January 15, 1883. It was such oil only which the defendant refused to accept.

4. The defendant does not admit the alleged sale for £625, or any other sum.

Action for not Accepting Goods and for Demurrage, &c., incurred in their Delivery.

1. The plaintiff has sustained damage by the defendant's breach of contract in not accepting delivery of 300 tons of old double-headed iron rails, which by a contract of sale made on the 6th of May, 1883, the defendant agreed to purchase from the plaintiff at £4 11s. a ton, on the terms that they should be delivered at the Steel Rail Mill Co.'s wharf at —, in the month of June, 1883, the defendant repaying to the plaintiff the cost of freight from X. where the rails were to the wharf.

2. On June 15th, 1883, the plaintiff duly tendered to the

defendant at the said wharf the said 300 tons of rails, but the defendant refused to accept the same.

3. The plaintiff resold the rails at £4 1s. per ton.

4. The plaintiff paid £43 for freight from X. to the wharf in respect of the rails, and £10 for demurrage caused by the defendant's refusal.

The plaintiff claims £150, £43 and £10, or £203 in all.

Action for Damages for Delivering Goods not Merchantable and Dangerous.

1. The plaintiff has suffered damage by the defendant's breach of contract for sale at the price of £1000, and delivery by the defendant to the plaintiff on the 1st of December, 1883, of 200 tons of new white clover hay fit for transmission by sea and sale to the French Government at Tonquin.

2. It was a term of the contract that the hay should be fit to send 6,000 miles by sea and fit for forage after the sea journey.

3. The defendant delivered the hay, but so ill-made, ill-packed, damp, and inferior that during the voyage to Tonquin it became ignited by reason of its own heat, and 100 tons of it were destroyed, and damage was thereby caused to the vessel *Impérieuse* in which it was being carried.

4. On arrival at Tonquin the remaining 100 tons were rotten and unfit for forage.

5. In consequence of the premises the French Government to whom the plaintiff had resold the hay for £1,250, properly refused to pay for it, and did not pay for it, but required the plaintiff to pay, and the plaintiff properly paid to the French Government £50 for the said damage to the *Impérieuse*.

The plaintiff claims £300 damages.

Defence and Counter-claim.

Defence.

The defendant says that :—

1. He did not contract as alleged. His contract was to sell and deliver for the sum of £1000 on the 1st of December, 1883, 200 tons of new white clover hay of good quality.

2. It was not a term of the contract that the hay should be fit to send 6,000 miles or any distance by sea or fit for forage after any sea journey.

3. The defendant duly delivered the hay. It was not ill-made, ill-packed, damp, or inferior. It was good and merchantable.

4. Before the sale the plaintiff had opportunities of inspecting and did inspect the hay in question and bought it in reliance on such inspection and not otherwise.

5. The defendant does not admit that the hay became ignited or that damage was caused to the *Impérieuse* or that the hay was ever rotten, unfit for forage, or that the French Government refused to pay or did not pay for the hay, or required the plaintiff to pay, or that the plaintiff paid any sum for any damage to the *Impérieuse*.

6. Before breach and on the 20th of November, 1883, the plaintiff and the defendant agreed in writing that any dispute in question arising in or out of the said contract, except payment of the price, should be referred to the arbitration of A. B., and that neither party should be entitled to sue for any breach of the contract, except for such damages as the said A. B. should award. The defendant is and always has been ready and willing to refer the plaintiff's claim to the arbitration of A. B. but the plaintiff refuses to do so.

Counter-claim.

The defendant says that :—

1. He repeats the allegations in paragraphs 1 and 3 of the defence.

The defendant counterclaims for £1000.

Action for refusing to accept Goods and not submitting Dispute to Arbitration as agreed.

1. On October 4th, 1883, the plaintiffs agreed to sell and the defendants agreed to buy 500 bags of cleaned broken rice or "smalls" as per sample, at 8s. 3d. per cwt., and it was then further agreed that any dispute arising on the said contract should be settled by the arbitration of two sworn brokers in the usual

way, payment to be in one month, or, if goods previously delivered, cash against mate's receipt.

2. The plaintiffs duly delivered the said goods but the defendants refused to accept the said rice or any part thereof, and although this breach by the defendants of their contract was the subject of a dispute which arose on the said contract, namely, whether the rice was equal to sample, the defendants refused to have it settled by arbitration as agreed.

Particulars of Damage.

Loss of profit on 500 bags at 1s., £25.

The plaintiff claims £25.

Action for Balance of Account for Goods sold and Charges for certain Work done in connection with them.

1. In the years 1880, 1881, 1882, and 1883, the plaintiff sold and delivered to the defendant various pictures, engravings, carvings, and books at agreed prices. The plaintiff also during the same periods did work and incurred expenses for the defendant in and about the transport and carriage, and the cleaning, varnishing, framing, furnishing, and hanging the said pictures. Full particulars have been rendered to the defendant.

2. On the 21st of July, 1883, a balance remained due to the plaintiff of £531 15s. 6d., and the defendant then gave the plaintiff a bill of exchange at six months from the said date (which has not yet expired) for £231 15s. 6d.

3. The defendant has paid £50, part of the remaining £300.

The plaintiff claims £250, and interest thereon until payment.

Defence and Counter-claim.

Defence.

The defendant says that :—

1. He was induced to purchase the said pictures, engravings, and carvings by the fraud of the plaintiff, who falsely and fraudulently represented to the defendant that

divers of the same were original paintings by certain eminent masters, Rubens and Tintoretto, and that the prices for same were considerably below their value, which they were not, nor were any of them.

2. The said pictures, engravings, and carvings were of no value, and the defendant has returned them to the plaintiff.

3. The plaintiff did no work and incurred no expenses for the defendant in respect of the matters alleged, or any of them, or at all.

Counter-claim.

The defendant says that :—

1. He repeats the 1st and 2nd paragraphs of the statement of defence.

2. He was induced by the plaintiff's false and fraudulent representations to pay a sum of £50 to the defendant and to hand to him a bill of exchange for £231 15s. 6d.

The defendant counter-claims :—

(1) Payment of £50.

(2) Return of the bill of exchange.

(3) An injunction to restrain the negotiation of the bill of exchange.

Claim for Goods sold subject to Approval.

The plaintiff's claim is for the price of goods sold and delivered.

Particulars :

1883, Dec. 1,		
14 hogsheads of sugar, at £100 each	.	£1400
1883, Dec. 5,		
7 hogsheads of sugar, at £97 each	.	£679
		£2079
1883, November 30,		
Paid in advance	.	£500
Balance due	.	£1579

*Defence and Counter-claim.**Defence.*

The defendant says that :

1. The goods were delivered to him upon the terms that they should be subject to his approval, and that if he disapproved of them he might at any time within twenty-one days from the respective times of delivery thereof send them back to the plaintiff.

2. Neither of the said terms of twenty-one days has yet expired.

Counter-claim.

The defendant says that :—

1. He repeats paragraph 1 of the statement of defence.

2. He has disapproved of the goods, and within the said periods of twenty-one days has sent them back to the plaintiff.

3. He deposited £500 with the plaintiff on account of the price of the goods if he should not send them back. It was agreed that that sum should be repaid to the defendant if and when he should send back the goods.

The defendant claims £500 and interest until payment or judgment.

Defence (where the Writ has been specially indorsed) to Action for Price of Boiler, that it was not fit for the purpose for which Plaintiff knew it was intended, and Counterclaim on a Warranty.

Defence.

The defendant says that :—

1. At the time of the sale of the boiler, the plaintiff knew that it was required for the purpose of supplying steam to an engine used in the working of the defendant's colliery at Wigan, and that it would require to be capable of working up to a pressure of 100 lbs. an inch.

2. At the same time the plaintiff warranted the boiler fit for the purpose aforesaid, and that it was capable of working up to a pressure of 100 lbs. an inch.

3. The boiler was not fit for the purpose aforesaid. The defendant worked it up to a pressure of 85 lbs. only, when it exploded and became worthless.

Counter-claim.

The defendant says that :—

1. He repeats the 1st, 2nd, and 3rd paragraphs of the statement of defence.

2. The explosion of the said boiler destroyed the defendant's said engine, and injured the defendant's works and machinery in the said colliery, whereby the defendant has suffered damage.

3. Full particulars of the damages, amounting to £576, were delivered to the plaintiff before action.

The defendant claims £576.

Statement of Defence to specially indorsed Writ that the Goods were sold on an unexpired Credit.

Defence.

The defendant says that :—

1. The goods were sold on the terms that the defendant should have six months' credit for the payment of them, which term of credit has not yet expired.

2. It was another term of the contract of sale that the defendant should be allowed a discount of £15 per cent off the price.

Claim for not delivering Goods sold with Defences of the Statute of Frauds, and Rescission of the Contract and Plaintiff's Bankruptcy.

1. The plaintiff has suffered damage by breach of contract for sale and delivery by the defendant to the plaintiff of fifteen pipes of port wine, at £150 each, to be delivered f. o. b. at Oporto on the 17th of November, 1883.

2. The defendant did not deliver any of the said pipes of port wine.

Particulars of damage :—

Loss of profit on 15 pipes, at £30 each, £450.

The plaintiff claims £450.

Defence.

The defendant says that :—

1. The 17th section of the Statute of Frauds has not been complied with.

2. The contract was rescinded before breach. Particulars are as follows :—A letter from the defendant to the plaintiff, and an answer of the plaintiff, dated the 14th and 15th of October, 1883.

3. The plaintiff's affairs were liquidated by arrangement, pursuant to the 125th section of the Bankruptcy Act, 1869, and the cause of action vested in the trustees of his property.

Sale of Land (a).

Claim by Purchaser for Deficiency in Acreage.

1. On June 30, 1883, the defendant in writing agreed with the plaintiff to sell to the plaintiff the Paxton Estate, in the

Contracts relating to land must be evidenced by writing.

When plaintiff can proceed by a specially endorsed writ.

What damages can be sought.

(a) The 4th section of the Statute of Frauds provides (*inter alia*) that no action shall be brought whereby to charge any person upon any special contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. As to the effect of a written acceptance, referring to the preparation of a formal contract, see *Bonnevell v. Jenkins*, 8 Ch. Div. 70; *Rossiter v. Miller*, 5 Ch. Div. 648, 3 App. Cases, 1124; and *Hussey v. Horne Payne*, 4 App. Cases, 311.

Where, as would now scarcely ever happen, an estate was actually conveyed without the purchase-money having been paid, the vendor could claim the amount of the purchase-money, either by a special indorsement on his writ, or in a statement of claim setting out the transaction. In the ordinary case of the contract falling through for some cause or another, before an actual conveyance, it would seem that the plaintiff's (vendor's) claim must sound in damages for breach of the contract by the defendant, the measure of damage being the loss sustained by reason of the breach, as costs incurred and the diminution in value of the land. (*Laird v. Pim*, 7 M. & W. 474.) Such a claim, therefore, could not be the subject of a special indorsement.

In an action by the purchaser against the vendor for not completing the purchase, the former can claim as damages the costs of the agreement, investigating the title, searching for judgments and of endeavouring to procure a good title, and the deposit with interest. (*Hodge v. Earl of Lichfield*, 1 N. C. 492; *Hanslip v. Padwick*, 6 Exch. 615; *Sgt. Vendors, &c.*, 14th ed., 362.) In cases where it is decided that the plaintiff is entitled to damages for money or expenses incurred, it is

county of Hereford, describing it as containing 10,000 acres, for the sum of £500,000.

2. By a condition in the agreement it was provided that the vendor should make compensation for any error or misdescription.

sufficient if he has become liable for them. (*Richardson v. Chason*, 10 Q. B. 756.)

The purchaser cannot recover expenses incurred previously to entering into the contract, nor expense of a survey he has made before he knows the title, nor the expense of a conveyance drawn in anticipation (*Hodges v. Earl of Lichfield*, *supra*; and see *Godwin v. Francis*, L. R. 5 C. P. 295; and *Gray v. Fowler*, L. R. 8 Ex. 249); nor expenses incurred in preparing a conveyance after a defect in the title was discovered (*Pounsett v. Fuller*, 18 C. B. 660; 25 L. J. C. P. 145); or in further negotiations. (*Sikes v. Wild*, 30 L. J. Q. B. 325; S. C. ap. 32 L. J. Q. B. 375.) Where the purchaser has brought a suit for specific performance, which was dismissed for want of title, it was held he could not recover his costs in such suit. (*Malden v. Fyson*, 11 Q. B. 292.) And where the vendor brought such a suit and it was dismissed with costs for want of title, the purchaser could not recover his extra costs in such suit. (*Hodges v. Earl of Lichfield*, *supra*.) But since the union of the Courts and the introduction of counterclaims, these questions will no longer arise. A lessee with an option to purchase cannot recover expenses in improving the land before exercising his option where the title proves bad. (*Worthington v. Warrington*, 8 C. B. 134.)

What damages cannot be recovered.

Where the purchaser is held entitled to recover for the loss of his bargain, the measure of damages is the difference between the contract price and the market price at the time of the breach; and the price at which the estate was afterwards sold is *prima facie* evidence of the market value. (*Engell v. Fitch*, *supra*; and see *Godwin v. Francis*, *supra*.)

The parties may, in appropriate language, name a sum which is to be paid as liquidated damages by either of them on his failing to carry out his contract, which of course would include a failure to show a good title; and in such a case the sum named can be recovered. (*Lea v. Whitaker*, L. R. 8 C. P. 70.) The mere fact of designating the sum named as "liquidated damages" will not necessarily make it such; and where the contract contains a variety of stipulations of different importance, and a sum is named to be paid on breach of any of them as liquidated damages, this will be treated as a penalty. (*Magee v. Lavell*, L. R. 9 C. P. 107, 111.)

Effect of agreeing on a sum as "liquidated damages."

Where the defendant failed to carry out an agreement to demise certain land and deduce a good title, the intended lessee was held not entitled to recover the expense of raising the purchase-money, or the interest thereon, while awaiting completion, nor the expense of forming and registering a company for the purpose of carrying on certain works on the land, nor the profits that would have accrued to the company from the lease, or to the plaintiff as their solicitor in carrying their project into effect, such heads of expense being either premature or merely speculative. (*Hanslip v. Padwick*, *supra*.)

The principle is now settled that a purchaser cannot recover damages for the loss of his bargain, *i.e.*, the difference between the contract price and the price which he could get on resale, unless the vendor has been guilty of fraud in the transaction. (*Flureau v. Thornhill*, 2 Wm. Bl. 1078; *Sug. Vend. & Purch.* 14th ed. 358 (c.); *Pounsett v. Fuller*, *supra*; *Sikes v. Wild*, *supra*; *Bain v. Fothergill*, L. R. 6 Ex. 59; *aff.*

A purchaser cannot generally have damages for the loss

3. The plaintiff has paid the purchase-money, £500,000.

4. Since paying the purchase-money the plaintiff discovered, and the fact is, that the estate does not contain 10,000 acres, but 9,000 acres only.

The plaintiff claims £50,000 damages.

Defence.

The defendant says that :—

1. The conveyance of the estate has been executed, and the contract of sale completed.

2. By the agreement, and by the conveyance, the estate was not described as containing 10,000 acres, but as containing “by estimation 10,000 acres, or thereabouts, more or less.”

3. Until some time after the completion of the contract, and after execution of the conveyance, the defendant reasonably believed that the estate contained 10,000 acres.

4. The estate before the sale had been estimated, and at the time of sale was estimated by the defendant to contain 10,000 acres or thereabouts more or less.

Action by Vendor of Land and House against Purchaser for Breach of Contract, claiming Damages for Interim Depreciation.

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing, dated June 15, 1883, whereby the defendant agreed with the plaintiff to purchase from the plaintiff, at the price of £2,000, a piece of land called Meadow Field, with the house thereon, situate in the parish of Ulla-

of his bargain.

L. R. 7 H. L. 158 ; 43 L. J. H. L. 245.) Where, however, though the defendant has not been guilty of fraud in the contract, he by deliberately failing to give the plaintiff possession, prevents an advantageous resale by the latter, he is liable to compensate the plaintiff for the loss of his bargain. See *Engell v. Fitch*, L. R. 3 Q. B. 314, affirmed in Ex. Ch., L. R. 4 Q. B. 659, which does not appear to be disturbed by the decision in *Bain v. Fothergill*, *supra*.

The balance of authority is in favour of the view that if the vendor should innocently misrepresent the acreage of the property sold, the purchaser cannot, after completion, recover damages or compensation for the deficiency. (*Jolliffe v. Baker*, 11 Q. B. Div. 255 ; *Bos v. Holston*, where there was an agreement that compensation should be given, L. R. 2 Ex. 72 ; *Re Turner & Skelton*, 13 Ch. Div. 130, and *Allen v. Richardson*, 13 Ch. Div. 524, and the cases there cited.)

thorne, in the county of Cumberland, and to complete the said purchase on the 15th of July, 1883.

2. On the 14th of July, 1883, the defendant refused to complete the purchase.

3. The defendant has paid a deposit, on account of purchase-money, of £200.

Particulars of special damage :—

1883. Paid Mr. A., auctioneer, expenses			
June 15.	of sale	£29	0 0
„	Paid Mr. A., auctioneer, his fee .	30	0 0
July 31.	„ Mr. B., solicitor, his costs of sale	37	10 0
	Loss by depreciation in value of property	200	0 0
		£296 10 0	

The plaintiff claims £296 10s. 0d. for damages.

Defence and Counter-claim.

Defence.

The defendant says :—

1. The defendant was induced to enter into the contract by the plaintiff's representation that the premises agreed to be sold were free from any easement.

2. In fact the Meadow Field was and is subject to a right of way over it for foot passengers.

3. The defendant could not make a good title to the premises.

Counter-claim.

The defendant says :—

1. He paid the plaintiff £200 on account of the purchase-money of the premises on the 15th of June, 1883.

2. He repeats all the allegations contained in the statement of defence.

3. He has suffered damage by the plaintiff's breach of contract to convey the said premises free from any easement.

Particulars of special damage :—

1883. Paid Mr. C., solicitor, costs of inves-	
July 27. tigating title	£29 0 0
June 14. Costs of journey to premises from	
Kendal	3 0 0
	£32 0 0

The defendant counter-claims £232 and interest until payment or judgment.

Claim against purchaser for Non-completion, claiming Loss upon a Re-sale.

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing dated the 17th of July, 1883, whereby the defendant contracted with the plaintiff to purchase the Allen Mill and ten acres of ground, usually occupied therewith, situate in the parish of Allanton, in the county of —, for the sum of £10,000. By the said contract it was agreed that the purchase should be completed on the 29th of September, 1883, and that if the defendant should not then complete, the plaintiff should be at liberty to put up the premises on a re-sale, and that the defendant should repay to the plaintiff the costs of the re-sale, and any deficiency in price.

2. The defendant refused to complete on the 29th of September, 1883, or at all.

3. The plaintiff resold the premises by auction on the 30th of October, 1883, for £9000. The costs of the re-sale were £100.

The plaintiff claims £1,100.

Defence.

The defendant says that :—

1. The contract is not correctly stated in the statement of claim.

2. The purchase-money was not agreed at £10,000. It was agreed that it should be the sum fixed by A. B. as valuer for

the plaintiff, and C. D. as valuer for the defendant, and that, if they could not agree, the price should be £10,000.

3. The defendant appointed C. D. to act as his valuer as aforesaid, but the plaintiff refused to appoint the said A. B. as his valuer, or to allow the said A. B. to act as his valuer, whereupon the defendant rescinded the contract.

Claim for Damages for Breach of Contract to Deduce a Good Title and Convey by a Specified Day, Time being made of the Essence of the Contract.

1. By a contract in writing dated the 17th of October, 1883, the defendant agreed with the plaintiff to sell to the plaintiff for £10,000 a messuage and land situate near Gravesend, in the county of Kent, and known as "The Elms," and to deduce a good title to the premises, and to complete the contract by conveyance on the 18th of November, 1883, and that time should be of the essence of the contract. The plaintiff paid £1,000 to the defendant as a deposit on the purchase-money.

2. The defendant did not, on or by the 18th of November, 1883, or at all, deduce a good title to the premises, or complete the contract by conveyance or otherwise, whereby the plaintiff has suffered damage.

Particulars of special damage :—

1883.

Oct. 17, to Jan. 17, 1884. Interest on deposit of £1,000	£12 10 0
Nov. 18, to Jan. 17, 1884. Interest on £9,000 lying idle	112 10 0
Dec. 14, 1883. Paid Mr. C. costs of investigating title	74 0 0
	£199 0 0

The plaintiff claims £1,199.

Defence.

The defendant says that :—

1. He denies that he failed, on the 18th of November, 1883, or at all, to deduce a good title to the premises.

2. The plaintiff, before breach, agreed with the defendant to waive the stipulation that the title should be deduced and the contract completed by the 18th of November, 1883, and that time should be of the essence of the contract.

3. Since the waiver aforesaid a reasonable time for the completion of the contract has not elapsed.

Action against Vendee on an Agreement to Assign a Lease, claiming Liquidated Damages.

1. By an agreement in writing between the plaintiff and the defendant dated the 1st of December, 1883, the defendant agreed to purchase from the plaintiff for £1,500 the residue then unexpired of a term of 19 years from the 24th of June, 1880, in the dwelling-house and licensed premises known as "The Grapes," in Holborn, in the county of Middlesex: and it was thereby agreed that the purchase should be completed on the 1st of January, 1884, and (£100 being paid as deposit) £1,400 balance of purchase-money paid on that day, and that if either party should fail to complete on that day he should pay to the other the sum of £50 as liquidated damages.

2. The defendant refused to complete the contract or to pay the said sum of £1,400 on the 1st of January, 1884, whereby the plaintiff has suffered damage.

The plaintiff claims £50.

Defence and Counter-claim.

Defence.

The defendant says that:—

1. The £50 claimed is a penalty, and not liquidated damages.
2. The defendant was induced to enter into the contract by the false and fraudulent representations of the plaintiff. These representations were as follows:—

- (a.) That the takings of "The Grapes Inn" were from £160 to £180 a month;
- (b.) That the payments to the brewer and the distiller were £60 and £40 a month respectively;
- (c.) That the brewers and distillers were prepared to lend

£1,100 upon the security of the lease and goodwill of the premises contracted to be sold ;

(d.) That the house was capable of doing a much larger business.

Counter-claim.

The defendant says that :—

1. He repeats the 2nd paragraph of the statement of defence.
2. Relying upon the plaintiff's said representations, the defendant paid £100 to the plaintiff as deposit on account of the purchase-money.
3. As soon as the defendant discovered the said representations to be false, he rescinded the contract.
4. The defendant has suffered damage by the plaintiff's breach of contract.

The defendant counter-claims :—

- (1.) £100 ;
- (2.) Damages for the plaintiff's breach of contract.

Claim for Recovery of Deposit paid to Auctioneer on the Vendor's Failing to Complete.

1. On November 1, 1883, the plaintiff paid to the defendant £100, by way of deposit, on account of the purchase-money of "The Firs," at Brixton, in the county of Surrey, which A. B. agreed to sell to the plaintiff for £1,000, and the defendant agreed to repay the said sum of £100 to the plaintiff if the said contract of sale should not be completed on December 1, 1883.

2. A. B. was unable to perform the said contract on December 1, 1883, and in fact has never completed it.

The plaintiff claims £100 and interest until payment or judgment.

Defence.

1. The said G. H. was not the servant of the plaintiff.
2. The defendant did not seduce and carnally know the said G. H.

Reply.

The plaintiff joins issue upon the defence.

to get possession of the person of the woman, then the father would have an action on the ground that she remained in his service. (*Speight v. Olivier*, 2 Stark. 495.) Another case in which there would be no remedy for a seduction, joined with subsequent pregnancy and illness, is the following. Suppose a woman in the service of her father or one master at the time of the seduction, and in the service of another master at the time of the pregnancy and illness, no action would lie by either master or the father. The father or first master could not sue, because there was no illness while in his service, and no loss of service. The second master cannot sue, because she was not seduced while in his service. (*Davies v. Williams*, 10 Q. B. 725.)

To entitle a father to sue in this action for the loss of his daughter's services, it is not necessary to show any contract of service between them. (*Evans v. Walton*, L. R. 2 C. P. 615.) It is sufficient that the woman is not bound to give her services to anybody else, and that living with him or only temporarily absent, he can at any moment command her services. If the father is dead, the mother or any other person who stands *in loco parentis* to the woman seduced has his rights. In *Terry v. Hutchinson*, L. R. 3 Q. B. 599, the plaintiff's daughter being under age went into service. After nearly a month the master dismissed her at a day's notice, and the next day on her way home to her father's house the defendant seduced her. It was held that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of the father to her services revived, and there was, therefore, sufficient evidence of service to maintain an action for seduction. See on the other hand *Hedgcs v. Tagg*, L. R. 7 Ex. 268, for circumstances under which it was held that the service was not proved.

There is one important difference between the case of a parent suing for the loss of a daughter's services, and a mere master suing. The measure of damages awarded to the latter is the bare money loss suffered; but in addition to this, a jury may award to a parent damages for the distress of mind endured, and the dishonour and disgrace cast upon the family. (*Bedford v. McKowl*, 3 Esp. 120.)

The defences that a defendant may set up to this action have already been indicated. He may (1) deny that the plaintiff was the master of the woman at the time of the seduction; (2) deny the seduction altogether; (3) admitting or denying the fact of seduction, deny that any pregnancy or illness, followed by loss of service, resulted while in plaintiff's service. He may also plead the Statute of Limitations where six years have elapsed since the alleged loss of service; and it would seem that where the seduction has been brought about or contributed to by the misconduct of the plaintiff in encouraging improper intimacies, or by gross neglect of parental duties, a plea to that effect will be a good answer. (*Riddie v. Scoot*, Peake, 316.) Referring to this last decision, it is remarked in a work of high authority, "It may well be doubted

What is evidence of service to entitle a parent to sue.

Difference in measure of damages in actions by master and father.

Defences to actions for seduction.

Shares (a).

1. *Claim against a Shareholder for Allotment-Money and Calls.*

1. The plaintiffs' claim is for money in which the defendant as a member of the company is indebted to the plaintiffs (being a company incorporated under the Companies Act, 1862) for

Statement
of claim in
action for
calls.

whether this was not rather matter in reduction of damages." (Roscoe's Nisi Prius, 13th edition, 880, to which the pleader is also referred for a complete list of all the cases on this subject.)

(a) *Actions for calls.*—By s. 70 of the Companies' Act 1867, in an action by a company incorporated under that Act against a member for a call or other moneys due from him as a member, the special matter need not be set forth, and it is sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other moneys due, whereby an action or suit has accrued to the company. And by s. 25 "every share in any company shall be deemed and taken to have been issued, and to be held, subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint-stock companies at or before the issue of such shares."

When calls
may be
made.

The power to make calls is usually vested by the articles of association of the particular company in the directors, and they are bound, in making such calls, to conform to the conditions as to time, notice, and so forth, contained in the articles. Any failure in that regard would constitute a defence to the member sued. Schedule I. Table A of the Companies Act, 1867, provides regulation in relation to the making of calls, which are to apply, unless the articles of the company expressly provide otherwise. The articles frequently prohibit the directors from making any calls until a certain portion of the share capital has been subscribed. In such a case the directors are bound by the prohibition, but in other circumstances, calls can be legally made, although only a very small portion of the shares have been taken up. (*Ornamental Woodwork Co. v. Brown*, L. J. 32 Ex. 190; 2 H. & C. 63.) A statement that "no further calls are contemplated" affords no defence to an action for calls. (*Incidental Insurance Corporation v. Davis*, 15 L. J. 182.) "If a transfer of shares has been made and registered after a call has been made, but before it has become payable, it is conceived, although it is by no means clear, that the transferor, and not the transferee, is the person liable in an action for a call" (Buckley on Companies, 3rd ed., p. 365). Interest after the rate of 5 per cent. is payable upon all shares from the day appointed for the payment thereof until actual payment.

Fraud a
defence if
shares at
once re-
pudiated.

In an action for calls, the defendant, in addition to defences founded on a denial of the right of the directors to make calls, or the informal way in which their powers were exercised, or a denial of the fact that the defendant is a member of the company, may plead that he was induced to take the shares by the fraud of the company acting through its responsible officers or even by innocent misrepresentation.

A defendant, however, can only rely successfully upon the fraud in a defence where he alleges and pleads that as soon as he discovered the fraud, he repudiated the shares. (*Bulchy-Pum Lead Mining Co. v. Haynes*, L. R. 2 Ex. 324; *Deposit Life Assurance Co. v. Lyscough*, 28 L. J. Q. B. 29, 6 E. & B. 761; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. 145; *Venezuela Rail. Co. v. Kisch*, L. R. 2 H. L. 99.)

allotment-money of [here insert amount due on allotment] per share on [here insert number of shares held by defendant] shares in the company allotted to the defendant as such member, at his request, and for [here insert the number of calls in arrear] of £ [here insert amount of call] each upon [here insert number of shares] in the company of which the

A material misrepresentation in the prospectus of such a character that there is a complete difference in substance between what was supposed to be taken and what was taken, will also afford a defence, although the statement was made honestly and without any fraud. (*Smith's Case*, L. R. 4 H. L. 64; *Smith v. Reese River Co.*, L. R. 2 Eq. 264.)

It must be carefully noted, however, that when the company is being wound up and the liquidator is the plaintiff, neither fraud nor misrepresentation is any defence to an action for calls, unless the defendant has actually taken measures prior to the commencement of the winding up, and immediately upon discovering the fraud or misrepresentation, to repudiate the shares. (*Baker v. Turquand*, L. R. 2 H. L. 325; *Tawle's Case*, L. R. 4 Ch. 497; *Ross v. Estates Investment Co.*, L. R. 3 Ch. 682; *In re Scottish Petroleum Co.*, 23 Ch. Div. 413 (C. A.).) And this is the law whether the winding up of the company is a compulsory or voluntary winding up. (*Stone v. The City & County Bank*; *Collins v. The City & County Bank*, 3 Ch. Div. 282.)

A person who has been duly settled on the list of contributories of a company, and on whom calls have been duly made, cannot (even in the case of a voluntary liquidation) in an action for calls by the liquidators of the company, counterclaim for a debt or damages due to him from the company. (*Government Security Investment Co. v. Dempsey*, 50 L. J. Q. B. 199.)

Liability to pay calls upon shares is, by sections 16 and 75 of the Act of 1862, in the nature of a specialty debt, and therefore the Statute of Limitations does not apply until after the lapse of twenty years.

Action for not accepting shares.—Shares in joint stock companies are not "goods, wares, or merchandise" within the Statute of Frauds, and writing is not as a rule essential to the validity of a contract for their sale, though by the 30 & 31 Vict. c. 29, s. 1, no contract for the sale of shares in any joint stock banking company (except the Bank of England or the Bank of Ireland) is valid, unless it is made in writing, and other requirements of the statute complied with. A custom on the London Stock Exchange to disregard the provisions of the 30 Vict. c. 29, is bad and unreasonable. (*Neilson v. James*, 51 L. J. Q. B. 369 (C. A.).) Sales of stock and shares are usually made on the Stock Exchange, and in such cases the transaction is regulated by the usages of the Stock Exchange, of which every person dealing there must be taken to have had notice. (*Masted v. Paine*, L. R. 6 Ex. 132 (2nd case); *Masted v. Paine* (1st case), L. R. 4 Ex. 81; *Grissell v. Bristowe*, L. R. 3 C. P. 112; L. R. 4 C. P. 36.) A contract for the sale of shares is not rescinded if the company is wound up between the making of the contract and the execution of the transfer. (*Whitehead v. Izod*, L. R. 2 C. P. 228.) Time is of the essence of the contract in the case of a contract to deliver shares on a particular day. (*Fletcher v. Marshall*, 15 M. & W. 755; *Oderet v. Rothchild*, 1 Sim. & H. 590.)

The measure of damage for not accepting stock sold is the difference between the contract price and the market price on the day of the breach of contract. (*Bowman v. Nash*, 9 B. & C. 145.)

Actions for not delivering shares.—The purchaser may have an action

How far fraud defence when company is in liquidation.

Writing not generally necessary on sale of shares.

Time generally of essence of contract.

defendant is a holder, whereby an action has accrued to the plaintiffs.

Particulars :—

1880.	Allotment of	shares to the de-	
	endant at £	per share . .	£
„	First call at £	per share .	
„	Second call at £	per share . .	
			£

The plaintiff claims :

Defence.

1. The defendant never became a member of the said company.
2. He had no notice of the said allotment or of the said calls.

2. Claim for Calls merely.

1. The plaintiffs' company is incorporated under the Companies Acts, 1862 and 1867, and the defendant is a member of it.

2. The plaintiffs' claim is for £100, in which the defendant is indebted to them in respect of a call made whereby an action has accrued to the company.

3. The said call was made on the 1st of May, 1880, for £5 a share on twenty shares in the said company held by the defendant.

The plaintiffs claim £100, and interest after the rate of 5 per cent. from the said 1st of May until payment.

against the seller of the shares for not delivering them, and in such a case the measure of damage is the difference between the contract price and the market value on or about the day of breach. (*Tempest v. Kilmer*, 3 C. B. 253; *Shaw v. Holland*, 15 M. & W. 136.) When the plaintiff has actually paid for the shares, he is of course entitled to the return of his purchase-money. Time is of the essence of the contract; and it is not necessary that the plaintiff should prove that he actually tendered the price of the shares to the defendant. (*Stephens v. De Medina*, 4 Q. B. 422.)

Defence and Counter-claim.

1. The defendant was induced to subscribe for the said shares in the said company by the fraudulent misrepresentation of the plaintiffs, contained in a prospectus dated the 1st of January, 1880, and issued by the plaintiff. The following are particulars :—

(a) The prospectus stated [*here insert the particular misstatement relied upon*], whereas, in fact [*here allege its falsehood*].

(b) The prospectus further stated “ . . . ,” whereas, in fact “”

2. The plaintiffs knew that the said statements were false.

3. The defendant further says that he was induced to purchase the said shares by the following material misrepresentations made by the plaintiffs in the said prospectus :—

(a) The prospectus stated [*here set out the misrepresentations relied upon*], whereas, in fact [*here allege its falsehood*].

(b) The prospectus stated, &c.

4. The defendant, as soon as he discovered the falseness of the representations set out in the 1st and 3rd paragraphs hereof, repudiated the said shares.

Counter-claim.

5. The defendant repeats the allegations contained in paragraphs 1, 2, 3 and 4 hereof, and says that upon the allotment of the said shares to him he paid to the plaintiffs the sum of £5 per share.

The defendant counter-claims £100.

Reply.

1. The plaintiffs join issue upon the defence.

2. As to the counter-claim, the plaintiffs deny that they knew that any of the statements set out in the defence, and contained in the prospectus, were false.

3. None of the said misrepresentations were material. The plaintiffs made them *bonâ fide*, and with a belief in their truth.

4. The defendant did not rely upon the said representations in subscribing for the said shares.

5. The defendant did not repudiate the said shares upon discovering the alleged misrepresentations, nor has he ever done so.

Rejoinder.

The defendant joins issue upon the reply.

3. *Claim by Vendor of Shares against Purchaser for not Accepting Shares.*

1. The plaintiff has suffered damage by breach of a contract made by the defendant on the 1st of June, 1880, to accept and pay for £10,000 Ordinary Stock in the Great Eastern Railway, and £5,000 North Eastern Consols, at the then market price of the said stocks.

2. The defendant, on the 10th of June, 1880, refused to accept more than £3,000 North Eastern Consols.

Particulars of damage :—

Loss of £300 being difference between the market price of £10,000 Great Eastern Stock on the 1st of June and the 10th of June, 1880 . . .	£300 0 0
--	----------

Loss of £60 being difference between the market price of £2,000 North Eastern Consols on the 1st of June, and the 10th of June, 1880 . . .	60 0 0
---	--------

The plaintiff claims £360.

Defence.

1. The defendant did not contract with the plaintiff for the purchase of any Great Eastern Stock, and he only contracted to purchase £3,000 North Eastern Consols.

2. In the alternative the defendant brings the sum of £60 into Court, and says that it is sufficient to satisfy the plaintiff's claim herein.

Reply.

The plaintiff joins issue upon the defence.

4. *Claim by Purchaser of Shares for their Non-delivery.*

1. The plaintiff has suffered damage by breach of contract for sale and delivery by the defendant to the plaintiff of 50

shares in the Wisbeach Banking Company (Limited), to be delivered on the 2nd of May, 1880.

2. The defendant has not delivered any of the said shares.

The plaintiff claims £150, the difference between the contract price of the said shares and their value on the said 2nd of May, 1880.

Defence.

1. The defendant did not contract to deliver 50 or any other number of shares in the said company, as alleged, or at all.

2. The said Wisbeach Banking Company is a joint-stock banking company within the meaning of the 30 & 31 Vict. c. 29, s. 1, and the said contract of sale was not made in writing.

Reply.

The plaintiff joins issue upon the defence.

5. Claim by a Stockbroker for "Differences."

The plaintiff's claim is for commissions as a stockbroker, and for monies paid by him at the request of the defendant for differences on the London Stock Exchange.

Particulars of such commissions, and of the sums paid, exceeding three folios, accompany this claim.

The plaintiff claims £382 7s. 2d.

Defence and Counter-claim.

Defence.

1. The defendant instructed the plaintiff to sell the stock mentioned in the particulars accompanying the claim on the 13th of February, 1881, but the plaintiff failed to do so.

2. If the plaintiff had sold the said stock then, there would have been a profit on the sale thereof of £60.

Counter-claim.

3. The defendant repeats the allegations contained in paragraphs 1 and 2 hereof, and claims £60.

Reply.

1. The plaintiff joins issue on the defence.

2. As to the counter-claim, the plaintiff denies that the

defendant instructed him to sell the said stock on the said 13th of February.

3. If the stock had been sold then, it would not have realised a profit of £500 or any profit.

6. Claim against Defendant in the Alternative for Breach of Contract to take Debentures.

1. In the month of June, 1881, the defendant A. B., acting as the agent of the defendant C. D., promised the plaintiffs that in consideration they would not abandon the purpose for which the plaintiffs' company was formed, and would proceed to employ contractors and incur expense in furtherance of its objects, that the defendant C. D. would subscribe, or procure to be subscribed, the sum of £20,000 on the security of debentures of the company.

2. The plaintiffs' company, on the faith of the said promise, incurred great expense in furthering the objects of the company, but the defendant C. D. refused to subscribe or to procure to be subscribed any money upon the said security.

3. In the alternative the plaintiffs say that the defendant A. B. warranted at the time of making the said promise that he had authority from the defendant C. D. to make the said promise on his behalf.

The plaintiffs claim from the defendant C. D. £20,000 damages, or, in the alternative, from the defendant A. B. damages.

Defence of Defendant C. D.

If the defendant A. B. made the said promise (which the defendant does not admit) he had no authority to make it on behalf of this defendant.

Defence of A. B.

1. The defendant A. B. never warranted that he had authority from the defendant C. D. to make the said promise or any other promise.

2. The defendant does not admit that he made the promise alleged or any other promise, or that the plaintiffs, on the faith of anything he said, incurred great or any expense.

7. Claim for a Mandamus to allot Shares in a Railway Company (a).

1. The defendants are a company incorporated under Act or Acts of Parliament.

2. One C. W. W., or Messrs. W. S. and W., being entitled on the opening of a certain line of the defendant company for traffic to 800 £10 Ordinary Shares, and the said C. W. W. being entitled to further 400 £10 Ordinary Shares in the defendant company, gave notices in writing under their respective hands to the defendant company whereby the said C. W. W. and the said Messrs. W. S. and W. absolutely assigned the said shares respectively to one F. E., or his nominee or nominees.

3. The said F. E., by writing addressed to the defendants, nominated the plaintiffs to receive the said shares assigned to the said F. E., which said notice the defendants acknowledged by writing addressed to the plaintiffs on the 6th day of October, 1883.

4. The said line of the defendant company was opened for traffic on the 10th September, 1883.

5. The plaintiffs were and are entitled to be entered in the register of shareholders of the defendant company as shareholders in respect of the said shares, and to have certificates of the said shares issued to them by the defendant company, according to the provisions of the statutes regulating the defendant company in that behalf, and it was and is the duty of the defendants to enter the plaintiffs in the said register of shares as such shareholders, and to issue certificates of the said shares to the plaintiffs accordingly.

6. The plaintiffs were and are personally interested in being so entered as aforesaid, and in having such certificates of the said shares issued to them, and the plaintiffs sustain and may

(a) A mandamus will lie against a chartered company to compel it to place the plaintiff, a shareholder, on the register of the company. (*Norris v. Irish Land Co.*, 8 E. & B. 512.) Order LIII. regulates the practice where an action is brought for a mandamus. By r. 1. the claim of a mandamus must be endorsed upon the writ of summons, and by r. 3. "if judgment is given for the plaintiff the Court or judge may by the judgment command the defendant either forthwith, or on the expiration of such time, and upon such terms as may appear to the Court or a judge to be just, to perform the duty in question. The Court or a judge may also extend the time for the performance of the duty."

Provisions
of the
Rules of
1883 as to
mandamus.

sustain damage by the non-performance by the defendants of their said duties.

7. Performance of the said duties by the defendants has been demanded by the plaintiffs of the defendants, but the defendants have refused and neglected to perform the same.

The plaintiffs claim a mandamus commanding the defendants to cause the names of the plaintiffs to be entered on the register of shareholders of the defendant company as proprietors of 1200 £10 Ordinary Shares of the defendant company, and to cause certificates with the seal of the defendant company of the proprietorship by the plaintiffs of such shares to be delivered to the plaintiffs.

Sheriff (a).

1. *Claim against a Sheriff for Wrongful Execution.*

1. On the 13th of March, 1880, the defendant by his officers wrongfully entered the plaintiff's dwelling-house, 16, Burton Crescent, Bristol, and under the colour of a writ of elegit

Sheriff
liable for
mistakes of
his officers.

(a) The sheriff is liable for the acts of the under-sheriff and his bailiffs and assistants in the course of the execution of their duty, and if therefore they levy upon the wrong goods, or arrest the wrong person, or extort improper fees, or fail to levy according to the tenor of the writ, or indeed are guilty of any misconduct, the sheriff is exposed to an action at the suit of the person damaged. But if the particular act of misconduct was not committed while the bailiffs or other subordinate officers of the sheriff were acting in the course of their duty, or where they are acting collusively with the execution creditor without the sheriff's knowledge, he will not be liable. (*Raphael v. Goodman*, 8 Ad. & E. 565; *Crowder v. Long*, 8 B. & C. 598.)

He may by
interplead-
ing obtain
order pro-
tecting
him.

The most common action against the sheriff is for wrongfully taking the plaintiff's goods in execution. It has been law from the earliest times that the sheriff must at his peril execute the writ only upon the goods of the person mentioned in the writ. It is his business to satisfy himself that the goods belong to the execution debtor before he seizes; and if he makes any mistake he is liable to an action, subject in the event of interpleader proceedings, to the Court protecting him against suit by making an order that no action shall be brought against the sheriff. The importance of the law with regard to the liability of sheriffs for wrongful seizures has been a good deal diminished by the free exercise by judges at Chambers of this power of directing no action against the sheriff. The rule is now well settled at Chambers that unless it can be shown that the sheriff has been guilty of some improper conduct, he shall be indemnified by the order of the Court against any further proceeding.

The sheriff must not break into the premises. He will be liable to an action if he does so, but it would seem that the validity of the

against A. B. trespassed therein and seized all the plaintiff's household furniture and effects.

2. The defendant remained in the plaintiff's said house four days, and the plaintiff has suffered damage thereby.

The plaintiff claims £500 damages.

2. Claim by Plaintiff in the Alternative against a Sheriff for Wrongful Execution and Sale.

1. The plaintiff A. B., at the time of the grievance herein-after mentioned, lived at 13, North Street, Brixton. The plaintiff C. D. was entitled as mortgagee to the household furniture in the said house under a bill of sale of the 10th of May, 1880.

2. The defendant by his officers on the 30th of May, 1880, entered and trespassed in the house of the plaintiff A. B., and wrongfully, under the colour of a writ of *fi. fa.*, seized all the said household furniture therein, and caused it to be sold by auction, and converted the proceeds thereof to his own use.

execution itself is not impaired. (*Percival v. Stamp*, 9 Exch. 167; 23 L. J. Ex. 25.) The sheriff must not remain on the premises an unreasonable time, and if he does so he is liable to an action. (*Ash v. Dawson*, 8 Exch. 237; 22 L. J. Ex. 59.)

The sheriff may also be sued by a landlord for taking goods on execution without paying to him a year's rent when so much rent is in arrear. He is of course liable for not paying over to the execution creditor the proceeds of the levy, and he may be sued if he neglects to arrest a person within his jurisdiction against whom a judge's order for his apprehension has been lodged in the sheriff's hands, or for permitting his escape after arrest. An action for not levying and for making a false return will also lie against him at the instance of the execution creditor. The plaintiff here will have to plead that the debtor had effects in the sheriff's bailiwick of which the latter either had notice or by due diligence might have had notice. In this action the measure of damages is the value of the goods on which execution might have been but was not levied, yet it is for the jury to say, looking at all the circumstances of the case, whether, if the execution had been levied, the plaintiff would have derived any benefit from it by reason of the other creditors of the debtor being in a position to make him bankrupt, and if there was no reasonable probability of benefit to the plaintiff, the defendant is entitled to a verdict. (*Hobson v. Thellusson*, L. R. 2 Q. B. 642.)

If the sheriff or his officer extorts a larger sum for fees than he is authorised to charge he is liable to an action for extortion. With regard to the right of the sheriff to sue for his fees, it has been recently held that a sheriff's officer who has executed a writ of *fi. fa.*, cannot maintain an action for his fees against the solicitor of the execution creditor where the solicitor has done nothing more than deliver the writ to the sheriff for execution. (*Royle v. Busby*, 6 Q. B. D. 171; 50 L. J. Q. B. 196, C. A., overruling *Brewer v. Jones*, 24 L. J. Ex. 143; 10 Exch. 665.)

Instances of actions against sheriff.

Solicitor of execution creditor not liable for sheriff's fees.

The plaintiff A. B. claims £100 damages for the said trespass and for the loss of his interest in the said furniture.

The plaintiff C. D. claims £100 damages in respect of the loss of his interest in the said furniture.

Defence.

1. The defendant is the Sheriff of Surrey, and he entered the said house and seized the said household effects under a writ of *fi. fa.* against the goods of the plaintiff A. B., duly issued, at the instance of X. Y., out of the Queen's Bench Division of the High Court of Justice, and delivered to him in due course to be executed.

2. The defendant executed the said writ according to its tenour, and the proceeds of the sale of the effects seized have been paid over to the said X. Y.

3. The defendant denies that the plaintiff C. D. had any title to the said goods as mortgagee or otherwise.

4. The bill of sale mentioned in the statement of claim was not registered.

Reply.

The plaintiffs join issue upon the statement of defence.

3. Claim against a Sheriff for Selling with Undue Haste and without Sufficiently Advertising.

1. The defendant on the 10th of September, 1880, seized several valuable race-horses, the property of the plaintiff, under a writ of *fi. fa.* against the plaintiff, and wrongfully sold the same with undue and unnecessary haste, and without giving reasonable notice of and properly advertising the said sale.

2. The defendant also sold a greater number of the said race-horses to satisfy the said execution than was necessary.

The plaintiff claims £1500 damages.

4. Claim against a Sheriff for a False Return.

1. On the 11th of April, 1880, the plaintiff caused to be delivered to the defendant a writ of *fi. fa.* issued out of the Queen's Bench Division of the High Court of Justice upon a

judgment obtained by the plaintiff against one A. B., of C., directing the defendant, as sheriff of B., to levy the sum of £87 10s. 2d. upon the goods and chattels of the said A. B. within his bailiwick.

2. The said A. B. had more than sufficient goods within the defendant's bailiwick to satisfy the said writ, but the defendant neglected to seize the same, and falsely returned to the said writ, that A. B. had no goods within his bailiwick, whereby the plaintiff has wholly lost the said sum of £87 10s. 2d.

The plaintiff claims £—— damages.

5. *Action against a Sheriff for Extortion.*

1. The plaintiff has suffered damage by the wrongful act of the defendant, who, on the 13th of July, 1880, entered his house, in Rye, and, under the colour of a writ of *fi. fa.*, seized the plaintiff's household goods therein, and, by a threat of selling the same, extorted from the plaintiff £7 10s. 2d. for his alleged fees and charges, in addition to the amount of the judgment debt.

2. The defendant was only entitled to £2 13s. 6d. for his fees and charges.

The plaintiff claims £50 damages.

Solicitor (a).

1. *Claim by a Solicitor for his Costs.*

1. The plaintiff's claim is for the sum of £105, being his costs and charges while acting as the defendant's solicitor upon

(a) *Claim by a solicitor for his charges.*—In order to enable a solicitor to recover his charges for professional services he must be prepared to prove—

1. That he was duly admitted, enrolled, and qualified as a solicitor. By the Stamp Act, 1870, a solicitor who directly or indirectly acts or practises in any Court as such without having a duly stamped certificate in force at the time, shall be incapable of maintaining any action or suit for the recovery of any fee, reward, or disbursement in relation to any act or proceeding by him in such capacity. And by the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68, s. 12), no costs, &c., in relation to any act or proceeding by a solicitor without being duly qualified to act as such, shall be recoverable in any action, &c. By 23 &

A solicitor must take out a certificate to enable him to recover his fees.

his retainer in the cause of *Smith v. Smith* from the 3rd of January, 1880, to the 10th of July, 1880.

2. A signed bill of the said costs was delivered by the plaintiff one month before action.

The plaintiff claims £105.

Law List
prima
facie evi-
dence of
his quali-
fication.

24 Vict. c. 127, s. 22, the *Law List* is *prima facie* evidence that the persons whose names are inserted in it, in the list of solicitors, have obtained stamped certificates for the current year (Nov. 16 to Nov. 15), and the absence of a solicitor's name therefrom is *prima facie* evidence that he has not obtained a certificate for such current year; but in the latter case an extract from the Roll of Solicitors, signed by the Secretary of the Law Society, is evidence of the facts appearing in such extract.

2. His retainer as solicitor by the defendant, which may be done by showing either an express retainer, or that the defendant attended at his office and gave directions, or otherwise recognised his employment. A retainer need not be in writing, but as a matter of precaution, a solicitor should always have a written retainer.

3. That the business was done, which may be proved by a clerk or other agent who can speak to the existence of the cause or other business in respect of which the charges are made, and can prove the main items. (*Roscoe, Ev. Nisi Prius*, 13th ed. 473.)

Delivery
of a bill
month
before
action
essential.

4. That a bill was delivered pursuant to 6 & 7 Vict. c. 73, s. 37, which provides that no solicitor, nor an executor of any solicitor, shall commence or maintain an action for the recovery of any fees, charges, or disbursements for any business done by him as such solicitor until the expiration of one month after he shall have delivered to the defendant, or sent by post, or left for him at his counting-house, office, dwelling-house, or last known abode, a bill of such fees, &c., which shall be subscribed by him or any one of his partners, by his name or the name of his firm, or be accompanied by a letter so subscribed, and referring to such bill. Under this enactment a solicitor's bill cannot be recovered on an account stated, without proving the delivery of the bill, though the amount has been admitted. (*Eicke v. Nokes*, 1 M. & Rob. 359.) But he may recover on a promissory note given for the amount. (*Jeffreys v. Erens*, 14 M. & W. 210.) The bill must after delivery be left with the defendant for examination. (*Brooks v. Mason*, 1 H. Bl. 290.)

A delivery to the defendant's solicitor, if he himself afterwards attends the taxation, is sufficient. (*Vincent v. Slaymaker*, 12 East, 372.) So a delivery to one of several persons who join in the retainer. (*Fenchett v. How*, 2 Camp. 277.)

Solicitors
may make
special
agreements
in writing
as to their
fees.

By the Attorney and Solicitors Act, 1870 (33 & 34 Vict. c. 28, s. 4), a solicitor may make an agreement in writing with his client respecting the amount and manner of payment for his fees or disbursements, either by a gross sum, or commission, or salary; but where the agreement is in respect of business transacted in Court, the amount payable thereunder shall not be received by the solicitor until the agreement has been approved by a taxing officer. Sect. 7 enacts that a provision in any such agreement that the solicitor shall not be liable for negligence as such solicitor shall be void. By sect. 8 no action shall be brought to enforce such agreement, but it may be enforced by the Court on motion or by petition. By sect. 15 an agreement under this Act obviates the objection of no signed bill having been delivered when an action is brought to recover the solicitor's charges.

An agreement by an attorney with a client "to charge him nothing if he lost the action, and to take nothing for costs out of any money that

Defence and Counter-claim.

1. The defendant did not retain the plaintiff as his solicitor in the said cause.

2. If the defendant did retain the plaintiff, it was upon an express agreement in writing made between the plaintiff and

might be awarded to him in such action," need not be in writing. (*Jennings v. Johnson*, L. R. 8 C. P. 425.) In *Rees v. Williams*, L. R. 10 Ex. 200, it was held that sect. 8 of the Act of 1870 was intended to prevent actions to recover the remuneration agreed upon in lieu of costs when the work had been done, and did not apply to an action for refusing to allow the attorney to do the work and earn the remuneration, for which an action may be brought.

It has also been held that to constitute an agreement as to costs between a solicitor and his client within the meaning of sect. 4 of this Act the document must be signed by both parties. (*Ex parte Munro, re Lewis*, 1 Q. B. D. 724; 45 L. J. Q. B. 816.)

By the 44 & 45 Vict. c. 44, which is entitled "an Act to make better provision respecting the remuneration of solicitors in conveyancing, and other *non-contentious business*," a new scale of charges in regard to the classes of business mentioned is authorised, and it is provided by sect. 8 that a solicitor may make a special agreement *in writing* with his client as to the amount of remuneration he shall receive, and "the agreement may be sued and recovered on or impeached and set aside in like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor." It seems therefore, that special agreements made under the 44 & 45 Vict. c. 44, may be sued on; but special agreements made under the 33 & 34 Vict. c. 28, may not be sued upon.

Defences.—The foregoing outline of the conditions it is essential in the absence of admissions by the defendant to establish, indicate sufficiently the chief defences to this action. They are—1st. Denial that the plaintiff was duly admitted and qualified to practise as a solicitor at the time of the rendering the services. 2nd. That he had not taken out a certificate pursuant to the 6 & 7 Vict. c. 73, s. 26. 3rd. A denial that the plaintiff delivered a bill pursuant to the 6 & 7 Vict. c. 73, s. 37, in cases which do not come within the provision of the Attorneys and Solicitors Act before referred to as to special agreements. 4th. Denial of the retainer. 5th. Denial that the services were rendered, including allegations charging negligence or incompetence.

The plaintiff's negligence is no defence if it has not been such as to deprive the defendant of all benefit. (*Templer v. McLachlan*, 2 N. R. 136.) But where such has been the case, it is a good defence. See for several instances, *Huntley v. Bulwer*, 6 N. C. 111; *Bracey v. Carter*, 12 Ad. & E. 373; *Long v. Orsi*, 18, C. B. N. S. 610; 26 L. J. C. P. 127; *Lewis v. Samuel*, 8 Q. B. 685 (in which the plaintiff sued only for costs out of pocket, to which he had agreed that defendant's liability should be limited). An attorney cannot recover costs of suit in an inferior Court, which, as he ought to have known, had no jurisdiction in the matter, and was restrained by prohibition. (*Robinson v. Emanuel*, L. R. 9 C. P. 415, 416.) So where he sues in a Court which has no adequate powers to examine material witnesses out of the jurisdiction, and the suit fails accordingly. (*Cox v. Leach*, 1 C. B. N. S. 617; 26 L. J. C. P. 125.) When it appeared that the plaintiff paid no attention to the defendant's case, but resided at a distance from his office, and his business was transacted by a person employed by him, it was held he could

Solicitors may sue on special agreements as to non-contentious business.

Common defences to actions by solicitors for their charges.

When the plaintiff's negligence disentitles him from recovering.

the defendant that the plaintiff would only charge for disbursements and costs out of pocket.

3. A signed bill of costs was not delivered a month before action brought.

What amount of negligence in a solicitor dis-entitles him to his costs.

The advisability of making a solicitor's negligence the subject of a counter-claim.

Solicitor liable for gross negligence.

Judgment of Tindal, C. J., as to what amounts to "gross negligence."

not recover, even without reference to the success or miscarriage of the business done. (*Taylor v. Glassbrook*, 3 Stark. 75; *Hopkinson v. Smith*, 1 Bing. 13.) Where the plaintiff has through inadvertence or inexperience done useless work, he cannot recover for it; and where there are charges for such work and separate charges for work for which he is entitled to recover, the former may be expunged. (*Shaw v. Arden*, 9 Bing. 287.) Where, however, there has been some other cause concurring with the plaintiff's negligence or incompetence, and conducing to the loss of benefit to the defendant, it forms no defence. (*Dax v. Ward*, 1 Stark. 409.) It is no ground of defence that the plaintiff neglected to put in a plea for delay according to defendant's instructions. (*Johnson v. Alston*, 1 Camp. 176.) The fact that an instrument prepared by the plaintiff turns out to be illegal is no defence to an action for the charge for preparing it if there was any reasonable doubt of its legality. (*Potts v. Sparrow*, 6 C. & P. 749.) And see as to the effect of an error in matters of difficulty, *Bulmer v. Gilman*, 4 M. & Gr. 108; and *In re Sudd*, 34 L. J. Ch. 562; 34 Beav. 650.

In preparing a statement of defence in cases where the instructions disclose serious negligence or want of knowledge of practice or law, which has deprived the defendant altogether or in some measure of the benefit of his claim or defence, it would perhaps be the better course to make such negligence the subject of a set-off or counter-claim.

Before the Judicature Acts came into force, if a solicitor who acted as the agent of another sued the client, it would be a good defence that credit was given to the principal solicitor by the plaintiff and not to the client, and evidence to show that this was the custom in the profession would be admitted in support of such a defence. But since the above Acts came into force, if the principal solicitor and his agent sued together as plaintiffs and claimed alternatively, this defence would hardly avail the defendant.

It may be here mentioned that the law is now well settled that a London agent cannot, as against the country *lay* client, retain moneys which he has recovered in a suit for him to satisfy the general balance of an account due by the country *legal* client. (*Ex parte Edwards*, 8 Q. B. Div. 262 (C. A.).)

Action against a solicitor for negligence.—There must be gross negligence or ignorance in the performance of his professional duties by a solicitor to render him liable to an action by his client. (*Parry v. Landell*, 12 Cl. & F. 91.) He is bound to bring a fair amount of skill, care, and knowledge to the performance of his duty, and this is a question of fact for the jury, under the direction of the judge, who is to explain the nature of the duty, and the degree of negligence or ignorance which will make him responsible. (*Hunter v. Caldwell*, 10 Q. B. 69; aff. *ib.* 83.) "It would be extremely difficult," observes Tindal, C. J., delivering the judgment of the Court, in *Godefroy v. Dalton*, (6 Bing. 467—9), "to define the exact limit by which the skill or diligence, which an attorney undertakes to furnish in the conduct of a case is bounded; or to trace precisely the dividing line between that reasonable skill and diligence, which appears to satisfy his undertaking and that *crassa negligentia* or *lata culpa* for which he is undoubtedly responsible. The cases, however, appear to establish, in general, that an attorney is liable for the consequence of ignorance or non-observance of the rule of

4. The plaintiff's services were wholly useless to the defendant in the said action. The defendant lost the same by reason of the plaintiff negligently bringing the action in the Lord Mayor's Court, which had no jurisdiction over the subject-matter of the suit.

practice of the Court in which he sues, for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction, or such as are usually intrusted to men in the higher branch of the profession of the law. . . . We lay no stress upon the fact that the attorney had consulted counsel, because we think his liability must depend upon the nature and description of the mistake or want of skill which has been shown, and he cannot shift from himself such responsibility by consulting another where the law would presume him to have the knowledge himself." (And see *Lee v. Walker*, L. R. 7 C. P. 121.)

What is
"gross negligence."

As to the power of solicitors to enter into a *bonâ fide* compromise of a suit, see *Chow v. Parrott*, 32 L. J. C. P. 197; 14 C. B. N. S. 74; *Green v. Crockett*, 34 L. J. Ch. 606; *Holt v. Jesse*, 3 Ch. Div. 177; *Soullly v. Dundonald*, 8 Ch. Div. 658; *Davis v. Davis*, 13 Ch. Div. 861.

A solicitor retained in an action has no implied authority after judgment for his client to agree on his behalf to postpone execution. (*Lorregrove v. White*, L. R. 6 C. P. 440.) Nor is it within the scope of the implied authority of a solicitor of a judgment creditor issuing a *fi. fa.* to direct the sheriff to seize particular goods. (*Smith v. Kral*, 9 Q. B. Div. 340.)

The general powers of a solicitor over a suit.

A stipulation in a special agreement under the Attorneys and Solicitors Act, 1870, that a solicitor shall not be liable for negligence is void. (S. 7.)

Where money of a client comes to the hands of a partner in a firm of solicitors, in the ordinary course of their business as such, the firm are liable in case of a defalcation by such partner. (*St. Aubyn v. Smart*, L. R. 5 Eq. 183; *Ib.*, 3 Ch. 646; *Dundonald, Earl of, v. Masterman*, L. R. 7 Eq. 504.) So where bonds are deposited with solicitors in ordinary course of business and stolen by one partner. (*Clæther v. Twiaden*, 24 Ch. D. 731.) If money is left in the hands of a member of a firm to be invested in a specific mortgage, the firm are responsible; but *aliter* where it is so left with a general direction that it is to be invested on mortgage, as this contemplates a character of business strictly belonging rather to the occupation of a monetary scrivener or money-lender than to that of solicitors. (*Harman v. Johnson*, 2 E. & B. 61; 22 L. J. Q. B. 297; and see *Plumer v. Gregory*, L. R. 18 Eq. 621.) A firm of solicitors is not liable for money entrusted to one of its members as a trustee. (*Dundonald, Earl of, v. Masterman*, *supra*.)

Liability of firm of solicitors for money of a client in hands of member.

Defences.—1. Denial of retainer, under which would be ranged a defence denying that the defendant acted as solicitor.

2. Denying the breach of duty.

3. Denial of damage, which, however, is only a defence to the extent of reducing the verdict to nominal damages. The onus lies on the defendant of showing that the plaintiff had either no good cause of action or no defence in the action about which the negligence is alleged to have been committed. (See *Godefroy v. Jay*, 7 Bing. 413.)

Common defences.

4. Statute of Limitations. The statute runs from the breach of duty complained of, and not from the discovery thereof, or the occurring of the consequential damages, unless *semble* the breach of duty has been fraudulently concealed. (*Gibbs v. Guild*, 51 L. J. Q. B. 313.) The

And by way of counter-claim, the defendant—

5. Repeats the allegations contained in the last paragraph, and says that he has suffered damage from the plaintiff's said negligence in his conduct for the defendant, as his solicitor, of the said cause of *Smith v. Smith*.

Particulars of damage :—

Taxed costs paid to the defendant Smith on the dismissal of the now defendant's action against him, £87.

The defendant counter-claims for £250.

Reply.

1. The plaintiff joins issue upon the defence.

2. As to the 4th paragraph, he says further, that he explained to the defendant that it was a nice question whether or no the Lord Mayor's Court had jurisdiction, and the defendant thereupon expressly directed him to proceed in the said Court, and said he was content to take all the risks incident to the action proceeding therein.

3. The plaintiff was not negligent in his conduct of the said cause as the defendant's solicitor.

Rejoinder.

The defendant joins issue upon the reply.

2. Claim by a Solicitor upon a Special Agreement in regard to Conveyancing Business.

1. On the 2nd of February, 1883, an agreement in writing

operation of the Statute of Limitations is not suspended or removed by acknowledgment in this action. (See *ante*, *Limitation of Actions*.)

Solicitors' Lien.—Solicitors have a lien for their general balance on papers of their clients which come to their hands in the course of their business. (*Stevenson v. Blakelock*, 1 M. & S. 535.) And under the 23 & 24 Vict. c. 127, s. 28, they may obtain an order charging with the payment of their costs "any property recovered or preserved" in any action through their instrumentality. Such an order may be made (1), in Chambers; (2), upon money paid into Court before the termination of the suit; and (3), even after the solicitor applying has ceased to be the solicitor on the record if he was solicitor at the time the money was paid into Court. (*Clover v. Adams*, 6 Q. B. Div. 622.)

If a solicitor improperly retains deeds or money belonging to a client he is liable to an action. But the client may, if he likes, instead of proceeding by action, apply by summons at Chambers, or upon motion in Court, for an order directing the solicitor to hand over the deeds or pay over the money.

Summary remedies by and against solicitors.

was made and signed by the plaintiff and defendant, whereby the plaintiff agreed to investigate the title to an estate called "Knarlye," which the defendant had purchased, and to execute the necessary deeds of conveyance to him for a gross sum of £250.

2. The plaintiff duly rendered all the agreed services for the said remuneration.

The plaintiff claims £250.

Defence.

1. The defendant was acting as the plaintiff's solicitor at the time of the signing of the said agreement, and he induced the defendant to execute it by falsely and fraudulently representing to him that if no special agreement were made, and he charged according to the ordinary scale, the defendant would have to pay him the sum of £350.

2. The sum which the defendant is entitled to charge, according to the ordinary scale, in respect of the said services, is £150, and the defendant brings the said sum into Court, and says it is sufficient to satisfy the plaintiff's claim herein.

Reply.

The plaintiff joins issue upon the defence.

3. Claim against a Solicitor for Professional Negligence.

1. The plaintiff has suffered damage from the defendant's negligence in his conduct for the plaintiff, as his solicitor, of business undertaken by the defendant on the plaintiff's retainer.

2. The negligence was in making an application under Order XIV., Rule 1, in the case of *A.B.* (the plaintiff) v. *C.D.*, when the case was one of unliquidated damages, and not of debt.

Particulars of damage :—

Taxed costs paid to defendant on dismissal of summons, £ .

The plaintiff claims £ .

4. Another Claim against a Solicitor for Professional Negligence.

1. The plaintiff has suffered damage from the defendant's negligence in his conduct for the plaintiff, as his solicitor, of

business undertaken by the defendant on the plaintiff's retainer.

2. The negligence was—

- (a.) In advising the plaintiff that he could, with every prospect of success, bring an action against one A.B. upon an alleged guarantee where the only evidence of the said guarantee was parol ;
- (b.) In neglecting to subpoena the plaintiff's witnesses to attend the trial of the cause of *C.D.* (the plaintiff) v. *A.B.* ;
- (c.) In failing to instruct counsel in the said cause, and in neglecting to attend at the trial himself.

3. Judgment was given for the defendant, with costs, in the said action of *C.D.* v. *A.B.*, and the plaintiff has had to pay to the said A.B. the sum of £130 for his taxed costs.

The plaintiff claims £500 damages.

Defence and Counter-claim.

Defence.

1. The defendant did not advise the plaintiff that he could bring the said action upon a verbal guarantee with any prospect of success.

2. Ten days before the trial of the said action the defendant gave the plaintiff written notice that he would not further act for him in the said cause, unless he forthwith paid to him the sum of £30 for fees to counsel, and to subpoena witnesses, which were then necessary disbursements.

3. The plaintiff refused to supply the defendant with any money, whereupon the defendant withdrew from the further conduct of the said cause.

Counter-claim.

1. Prior to the date of his withdrawal from the said cause his costs and charges against the plaintiff as his solicitor in connection with the said action, amounted to £55 13s. 4d.

Particulars of the said costs and charges were delivered to the plaintiff in a signed bill of costs more than one month before delivery of defence.

The defendant counterclaims £55 13s. 4d.

Reply.

1. The plaintiff joins issue upon the defence.

2. As to the 2nd and 3rd paragraphs the plaintiff says that at the time the defendant applied for the said sum of £30, he had in his possession a sum of £35 which the plaintiff had given him a week before upon the express agreement that it was to cover all the necessary disbursements in the said cause, and to provide for counsel's fees and the subpoenaing of witnesses.

3. The plaintiff denies that he is indebted to the defendant in the sum of £55 13s. 4d., or any other sum for professional services.

Rejoinder.

The defendant joins issue upon the reply.

5. Claim against a Solicitor for detaining Deeds from a Client.

The defendant detains from the plaintiff the plaintiff's goods and chattels, that is to say, a large number of deeds and other writings contained in a schedule which was served on the defendant on the day of , accompanied by a demand for the return of the said deeds and writings mentioned therein.

The plaintiff claims a return of the said deeds and writings or their value and £100 damages for their detention.

*Defence and Counter-claim.**Defence.*

1. The defendant is a solicitor, and the deeds and writings referred to in the statement of claim are certain documents delivered by the plaintiff to the defendant to enable him to investigate the title to an estate called "B." which the plaintiff had contracted to purchase.

2. The professional charges of the defendant in connection with the investigation of the said title amount to £60, of which the plaintiff has only paid £20.

3. The defendant holds the said deeds and writings under his lien as a solicitor for the balance of said costs and charges.

Counter-claim.

1. The defendant repeats the allegations in paragraphs 1 and 2 hereof.

Particulars of the said costs and charges were delivered in a signed bill of costs one month before the delivery of the defence herein.

The defendant counterclaims £40.

Reply.

1. The plaintiff joins issue upon the defence.

2. He further says that the defendant expressly agreed with him in writing to investigate the title to the property mentioned for the sum of £20, which sum the plaintiff has paid.

Rejoinder

The defendant joins issue upon the reply.

Specific Performance (a).*Action by Vendor against Purchaser.*

1. By an agreement [*or letters*] dated [*or made verbally at interviews on or about*] the — day of —, the plaintiff

Specific performance in the discretion of the Court.

(a) The interference of the Court of Chancery to compel specific performance of a contract being a matter within the discretion of the Court, specific performances will be refused in many cases. It has been said that a hard bargain will not be enforced, but the plaintiff left to his remedy at law. At all events the Court would not enforce a contract entered into by mistake, or obtained by fraud, or unconscionable means, or tainted with illegality, or immorality (*Thomson v. Thomson*, 7 Ves. 470); or a voluntary contract, as where A. covenanted to surrender copyholds in trust for B. his child (*Jeffreys v. Jeffreys*, Cr. & Ph. 141); or a revocable contract; and if there be no mutuality, specific performance will be refused. Therefore, as there can be no decree for specific performance made against an infant, an infant cannot obtain a decree for specific performance against another person. (*Flight v. Bolland*, 4 Rom. 301.) But it is no defence to an action for specific performance that, by reason of the Statute of Frauds, specific performance could not be decreed against the plaintiff. Specific performance of contracts which require personal skill will not be decreed, as, for instance, a contract to build a house or to sing at a concert. *South Wales Rail. Co. v. Wytch*, 1 K. & J. 186; *Martin v. Nuthin*, 2 P. Wms. 266.

In a recent case in which the plaintiffs claimed the specific performance of an agreement for the composition of a literary work by the

agreed to sell to the defendant the "Home Farm," Kent, for £——. The sale was to be completed on the —— day of——.

[If the agreement was verbal, add ——.]

2. The agreement so entered into has been part performed as follows: [state how].

defendant, alleging that the agreement was contained in three documents, the plaintiffs proved the first and third documents, but not the second, and it was held that the plaintiffs could neither have specific performance of the agreement contained in the first and third documents, nor damages for the breach of it. (*Port v. Marsh*, 16 Ch. Div. 395; 50 L. J. Ch. 287.) In the same case the plaintiffs claimed that it had been agreed, that the title page should state that the book had been edited by K. (which was not the case). K. did not object, but it was held that this savoured of fraud upon the public, and on that ground also specific performance was refused.

The Chancery Division has jurisdiction to enforce specifically an agreement for a separation and for the compromise of a divorce suit. (*Hart v. Hart*, 18 Ch. Div. 670; 50 L. J. Ch. 697.)

It is no answer to a suit for specific performance for the defendant to say that though he understood what the words of the agreement were, he was under a mistake as to their legal effect.

The Court is reluctant to decree specific performance of an ambiguous agreement, and although, where an agreement is clear, the Court must act upon its own view of the construction, without regard to the view entertained by the parties, yet where a party has throughout insisted on one construction of an obscure agreement, he cannot get specific performance on the footing of the opposite construction. (*Marshall v. Berridge*, 19 Ch. Div. 233.)

A contract for the sale of chattels to the plaintiff contained an express negative stipulation not to sell to any other manufacturer. Upon this, the Court granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which specific performance would not have been granted. (*Donnell v. Bennett*, 22 Ch. Div. 835; Cf. *Wolverhampton J., Co., v. L. & N. W. Rail. Co.*, L. R. 16 Eq. 433.) Whether the Court can enforce specific performance of an agreement to sell a medical practice, *quære*. (*May v. Thomson*, 20 Ch. Div. 705.)

There is an important distinction between seeking and resisting specific performance as to the admission of evidence, for though a defendant resisting specific performance may go into parol evidence to show that by fraud or mistake the written agreement does not express the real terms, a plaintiff cannot do so for the purpose of obtaining a specific performance with a variation. (*Woollans v. Hearn*, 2 Wh. & T. L. Cas. 468.) Where, however, a parol variation has been in part performed, a specific performance of the written agreement with the parol variation will be decreed. (*Legat v. Miller*, 2 Ves. 299.) The doctrine of part performance, however, only applies to contracts relating to land.

As a defence, parol evidence on the ground of surprise, fraud, accident, or mistake, is admissible, not only as collateral to, and independent of, the written agreement, but in contradiction to it. (*Ramabottom v. Gordon*, 1 V. & B. 165.)

And it may be said, in short, that unless the plaintiff comes with perfect propriety of conduct, clear from all circumvention and deceit, and the agreement is certain, fair, and just, in all its parts, or if the conditions of sale be misleading, or erroneous, specific performance will not be decreed. (*Hamett v. Bahn*, L. R. 20 Eq. 50; 2 Wh. & T. L. Cas. 489.) And where specific performance may injure a third person by

Effect of a negative stipulation.

Admissibility of parol evidence to vary written contract.

The plaintiff claims specific performance of the above agreement, and that the defendant may be ordered to pay the purchase-money and to accept a proper conveyance of the premises.

Action by Vendor against Purchaser's Executor for Specific Performance.

1. By an agreement in writing, dated the 20th day of August, 1883, the plaintiff agreed to sell to A. B. the house No. 75, High Street, Southwark, for £1,000. The sale was to be completed on the 29th of September, 1883.

2. On August 29th, 1883, A. B. died. The defendant is his executor, and has proved his will.

possibly creating a title with which he might have to contend, specific performance may be refused. (*Hamett v. Fielding*, 2 Sch. & Lef. 554.)

Contracts
relating to
personalty.

As a rule the Court will not decree specific performance of a contract regarding choses in action or personal chattels. But there are a few exceptions to the rule. If the contract relate to an article of peculiar distinction, or one *sui generis*, specific performance may be decreed, as for instance, a picture of high artistic merit, or the Pusey horn, or the patera of the Duke of Somerset. Damages would obviously be an inadequate remedy for breach of a contract to sell and deliver the Venua of Milo. (*Somerset v. Cookson*, 1 Wh. & T. L. Cas. 821.) It will be remembered that in detinue the Court may enforce the return of the specific chattel. Specific performance may also be decreed of a contract relating to personality where a fiduciary relationship exists between the parties, as broker and customer, or principal and agent. (*Wood v. Rowcliffe*, 3 Hare, 304.) And there are cases in which it has been decreed, when the subject matter of the contract was railway shares (herein differing from stock). (*Duncroft v. Albrecht*, 12 Sim. 199.) And debts due from a bankrupt estate. (*Adderley v. Dixon*, 1 Sim. & Stu. 607.)

In practice, however, the jurisdiction is usually invoked to enforce contracts relating to real property.

Acts of part
performance.

Where part performance is relied upon by the plaintiff to supply the want of compliance with the Statute of Frauds, the acts of part performance relied upon, must be such as can only be referable to the alleged agreement. Acts merely auxiliary to the agreement are not sufficient, *e. g.*, delivering an abstract of title. Taking possession may or may not be sufficient, according to circumstances. (*Lester v. Foxcroft*, 1 Wh. & T. L. Cas. 788.) Payment of the purchase-money will not take the case out of the statute. (*Bayless v. Morris*, 2 De G. M. & G. 349.) Nor is marriage where the contract is in consideration of marriage. (*Canon v. Caton*, L. R. 2 H. L. 129.)

As to the effect of promises to leave money by will, see *Maddison v. Alderson*, 8 App. Cas. The statute will be no defence if the fact be that the contract was not reduced into writing, owing to the fraud of the defendant.

In cases where there has been a mis-description of the property sold, the Court may decree specific performance, giving compensation to the party aggrieved by the mis-description, or if the mis-description be substantial, it may refuse specific performance altogether. The following

The plaintiff claims specific performance of the above agreement, and that the defendant may be ordered to pay the purchase-money, and to accept a proper conveyance of the premises from the plaintiff [*stating in each case what the defendant is required specifically to do*].

Examples of Defences to Actions for Specific Performance.

1. The defendant did not enter into the agreement.
 2. A. B. was not the agent of the defendant [*if alleged by the plaintiff*].
 3. The plaintiff has not performed the following conditions [*conditions*].
 4. The plaintiff did not [*alleged acts of part performance*].
 5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matters: [*state why*].
 6. The Statute of Frauds has not been complied with.
 7. The agreement is uncertain in the following respects [*state them*].
 8. [*Or,*] The defendant has been guilty of delay.
 9. [*Or,*] The defendant has been guilty of fraud [*or misrepresentation*].
 10. [*Or,*] The agreement is unfair.
 11. [*Or,*] The agreement was entered into by mistake.
- The following are particulars of (8), (9), (10), (11), [*or as the case may be*].
12. The agreement was rescinded under Conditions of Sale No. 11 [*or by mutual agreement*].

In cases where damages are claimed and the defendant disputes his liability he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, Statute of Limitations, Accord and Satisfaction, Release, Fraud, &c.

are examples of the latter class of cases, viz., where the vendor was seeking specific performance of a sale of copyholds sold as freeholds. (*Ayles v. Cox*, 16 Beav. 23.) Where an underlease was sold as a lease. (*Maddaley v. Booth*, 2 De G. & Sim. 718.) Where there has been fraud or the amount of compensation cannot be estimated. Generally the purchaser can insist on specific performance with an abatement for the misdescription. As to the limits of this doctrine, see *Durham v. Layard*, 34 L. J. Ch. 589, and *Jolliffe v. Baker*, 11 Q. B. D. 255.

Compensation where given.

Action by a Purchaser of Land claiming Specific Performance and Damages.

1. By an agreement in writing, dated the 1st of August, 1883, and made between the plaintiff and the defendant, the defendant agreed to sell to the plaintiff the Swanley Estate at L——, in the county of Sussex, for the sum of £19,400. The sale was to be completed on the 15th of September, 1883.

2. By the agreement, the defendant further agreed to put the house upon the said estate in complete repair, which he has not done, whereby the plaintiff has suffered damage.

3. The cost of putting the said house in complete repair will be £550.

The plaintiff claims—

- (1.) Specific performance of the agreement ;
- (2.) Execution by the defendant of a proper deed of conveyance to the plaintiff on payment of £18,850.

Defence.

The defendant says that—

1. He entered into the agreement by mistake.
2. The said mistake was the defendant's belief that the estate contained only 194 acres.
3. The defendant has since discovered, and the fact is, that the Swanley estate contains over 400 acres.
4. The agreement is an unfair one.
5. The price was calculated at £100 per acre, on the assumption, by both the plaintiff and the defendant, that the estate contained 194 acres, and no more.

Reply.

The plaintiff joins issue upon the statement of defence.

Action by Vendor against Purchaser claiming Specific Performance of a Verbal Contract partly Performed.

1. By a verbal agreement made at an interview between the plaintiff and the defendant on May 1, 1883, the defendant agreed to purchase the house and premises called the "Elma,"

at Hendon, in the county of Middlesex, for £2,000. The purchase was to be completed on the 24th of June, 1883.

2. The contract was afterwards part performed as follows :—
On June 24, 1883, the defendant took possession of the premises under the contract.

The plaintiff claims—

1. Specific performance of the above agreement.
2. Payment of the sum of £2,000.

Defence.

The defendant says that—

1. He denies that he agreed to buy the said house and premises at all, or that he agreed as alleged. If the defendant so agreed, the plaintiff induced the defendant to enter into the said alleged agreement by representing to him that the premises were in good repair, whereas in fact they were very much out of repair, and the defendant could not and did not discover that fact on an ordinary inspection of the premises, or at all, until after June 24, 1883 ; and

2. The plaintiff induced the defendant to enter into the said alleged agreement by representing to him that the premises were freehold, whereas in fact they were and are of copyhold tenure.

3. The defendant denies that he ever took possession of the premises, or otherwise did anything in part performance of the alleged agreement.

Action by Lessor against Lessee for Specific Performance.

By an agreement in writing, dated October 1st, 1883, and made between the plaintiff and the defendant, the defendant agreed to accept a lease from the plaintiff of the house No. 200, Cromwell Road, in the county of Middlesex, for twenty-one years, from the 25th of December, 1883, at the annual rent of £4,000, and subject to the covenants therein mentioned.

The plaintiff claims :—

- (1) Specific performance of the above agreement ;

- (2) That the defendant may be ordered to execute a counterpart of a proper indenture of lease under the above agreement.

Defence.

The defendant says that :

1. The plaintiff induced the defendant to enter into the agreement by the representation that the house was brick-built, which it was not and is not. The defendant agreed as alleged in reliance upon that representation.
2. The plaintiff has only a term of years in the house, and he and his assigns are bound by the lease to him to observe unusual covenants whereof the defendant was ignorant when he agreed as alleged. The said covenants are, not to use the house as a school, or for the practice of a physician or dentist.

Claim by the Purchaser of a Picture for Specific Performance.

1. On June 30th, 1883, the defendant in writing agreed to sell to the plaintiff an oil-painting by J. W. M. Turner, representing the passage of Hannibal over the Alps, for the sum of £15,000.
2. The said painting is unique and cannot be replaced.
3. The defendant refuses to complete the said agreement.

The plaintiff claims specific performance of the said agreement, and that the defendant may be decreed, on payment of the sum of £15,000, to deliver the said painting to the plaintiff.

Defence.

The defendant says that :—

1. Neither on June 30th, 1883, nor at any time since, was the defendant nor is he now entitled to or possessed of the said oil painting, or able to deliver the same to the plaintiff.
 2. The said painting is not worth £15,000.
-

Stoppage in Transitu (a).*Action against a Railway Company for failing to stop in Transitu when ordered by Owner.*

1. The plaintiff has suffered damage by defendants, on 5th of April, 1880, delivering to A. B. of C. certain goods which the plaintiff, as an unpaid vendor, had delivered to them as carriers consigned to the said A. B.

2. On the 3rd of April, 1880, the plaintiff gave the defendants notice that the said A. B. was insolvent, and required them not to deliver the goods to him, but to hold them for the plaintiff.

Particulars of damage :—

50 casks of composition pipes at £2 a cask, £100.

The plaintiff claims £100.

Defence.

The defendants say :—

1. They delivered the said goods on the morning of the 4th of April, 1880.

2. They did not receive the plaintiff's said notice until the afternoon of the said 4th of April, 1880.

(a) Stoppage *in transitu* is the right of an unpaid vendor to resume the possession, with which he has parted, of goods sold upon credit before they come into the possession of the vendee, who has become bankrupt, insolvent, or embarrassed in circumstances. (*Dixon v. Yates*, 5 B. & Ad. 315; *Bird v. Brown*, 4 Ex. 786.) "The term 'insolvent' when it relates to the right of stoppage *in transitu* means a general inability to satisfy obligations evidenced by stopping payment. In such a case the vendor is allowed to countermand delivery before or at the place of destination, and to resume the possession of the goods. . . . but it is not an unlimited right, for the vendor cannot exercise it if he has parted with documents sufficient to transfer the property, and the vendee upon the strength of them has sold the goods to a *bonâ fide* purchaser without notice."—Houston's Stoppage in Transitu, p. 1.

As to when the *transitus* is at an end so as to determine the vendor's right to stop, see *Bolton v. Lawashire & Yorkshire Rail. Co.*, L. R. 1 C. P. 431; *In re Whitworth*, 1 Ch. Div. 101; *In re Love*, 5 Ch. D. 35; *Ex parte Barrow*, 6 Ch. D. 783; *Grice v. Richardson*, 3 Appeal Cases, 319.

Stoppage *in transitu*, what it is.

When the right is lost.

Where the purchaser of goods has resold them, though the vendor loses by the resale the right to stop the goods themselves *in transitu*, he is entitled, if he gives that which would, had there been no resale, have been a valid notice of stoppage, to intercept, to the extent of his own

Surveyor.*Claim by a Surveyor for Services in connection with a projected Railway.*

The plaintiff's claim is for commission as a surveyor and railway engineer, for services rendered for the defendant at his request.

Particulars:—

1879. June 1	Preparing plans and sections to Sept. 1.	for railway from A. to B.	£500	0	0
1880. April 3 to April 10.	Attendances as witness before Committee of House of Commons, and superintending progress of bill through Committee.		£100	0	0

The plaintiff claims £600.

Defence.

1. The defendant never employed the plaintiff, or requested him to render any services.
2. If he did employ the plaintiff he did so as a director of the W. & M. Rail. Co. only, as the plaintiff knew, and upon the terms that he should not be personally liable to the plaintiff.
3. The plaintiff's charges are excessive and unreasonable.

Tenant (a).

(See *Landlord and Tenant*.)

1. *Claim by Landlord against Tenant for Rent, with Counter-claims by the Defendant and the Plaintiff.*

The plaintiff's claim is for £400, one year's rent up to Midsummer, 1880, of the M. farm, which the defendant holds from

unpaid purchase-money, so much of the sub-purchaser's purchase-money as remains unpaid by him. (Kemp v. Falk, 7 Appeal Cases, 573; following In re West-inthus, 5 B. & Ad. 817; Spalding v. Ruding, 6 Beav. 376; 12 L. J. Ch. 503.)

(a) In *Toke v. Andrews* (51 L. J. Q. B. 281) the plaintiff brought an action to recover arrears of rent of a farm held to Midsummer, 1881. The defendant, by his counter-claim delivered after the 29th of September.

the plaintiff under a demise in writing of the 20th of May, 1879, at a yearly rent of £400.

Defence and Counter-claim.

Defence.

1. The yearly rent of the said farm is £350.
2. Before action brought, the defendant paid to the plaintiff the sum of £150 on account of the said yearly rent of £350.

Counter-claim.

1. By the said demise of the 20th of May, 1879, the defendant, upon the determination of the said tenancy of the said M. farm, was entitled to the full value of all hay, straw, and fodder then on the farm, to be calculated at the market price thereof.

2. The said tenancy was determined on the 30th of December, 1880.

3. The market price of the hay, straw, and fodder then on the said farm was £420.

The defendant counter-claims £420.

Reply and Counter-claim of the Plaintiff.

Reply.

1. The plaintiff joins issue on the defence.

2. As to the counter-claim, the defendant denies that the said tenancy was determined on the said 30th of December.

3. By the said demise of the 20th May, 1879, the defendant was entitled to such a sum in respect of the hay, straw, and fodder upon the said farm at the determination of the tenancy as A.B., of C., and C.D., of E., should award to him, and no more.

4. A.B., of C., and C.D., of E., have not awarded any sum to the defendant.

claimed the amount due to him on a valuation as outgoing tenant. The plaintiff in reply, "by way of set-off and counter-claim" claimed the quarter's rent due on the 29th of September, and also a sum paid by him for tithe rent-charge left unpaid by the defendant. On application by the defendant to strike out this reply, it was held that the plaintiff was entitled to set up such a counter-claim in reply.

Counter-claim.

On the 25th of December, 1880, there became due to the plaintiff the further sum of £200 in respect of half a year's rent of the said farm of M.

The plaintiff counter-claims as against the defendant's counter-claim for the sum of £200.

2. *Claim by Outgoing Tenant against Incoming Tenant for
Fixtures, Tillages, &c., left on the Farm.*

The plaintiff's claim is for work and materials, seeds, manures, crops, tillages done on the Y. farm, Cumberland, by the plaintiff, the benefit of which was given up by the plaintiff to the defendant at his request, and for the price of tenant's fixtures left on the said farm by the plaintiff under an agreement in writing of the 3rd of March, 1880, made between the plaintiff and the defendant.

Particulars of the said fixtures, work, materials, &c., exceeding three folios in length, accompany this pleading.

The plaintiff claims £125 12s. 3d.

Defence.

The defendant says—

1. It was agreed in writing between the plaintiff and the defendant that the defendant should take the said fixtures and all the things mentioned in the claim at a valuation to be fixed by X.Y., and that the plaintiff should have no right of action for any sum except such sum as might be awarded by the said X.Y.

2. X.Y. has awarded that a sum of £95 should be paid by the defendant to the plaintiff.

3. The defendant brings into Court the sum of £95, and says it is sufficient to satisfy the plaintiff's claim herein.

Tender (a).*Defence of Tender.*

As to the whole [or, as to £ parcel of the money claimed, *as the case may be*], the defendant made tender before

(a) It is a good defence to an action that the defendant *before* breach tendered the amount of the debt due. The new rules of 1883

action [*or, on the day on which it fell due*] of £ [*state here the amount actually tendered*], and has paid the same into Court.

provide expressly for a plea of tender *before action*, and the form of a plea of tender given in the schedule contemplates the contingency of a plea of tender *before breach*. Practically there can be little or no difference between the two defences, because if a plea of tender before action were proved, the Court in the exercise of its almost absolute power over costs would no doubt give the defendant his costs of the suit.

Plea of tender.

By Order xxii. r. 3. "With a defence setting up a tender before action, the sum of money alleged to have been tendered must be brought into Court," and the fact that it has been paid into Court should be stated in the defence according to the form in the text.

The tender may be made to the creditor or to some one "who is either, by the course of practice or by direct authority from his principal authorised to receive the money tendered, or one whom the person who makes the tender has good reason—given by the principal himself—to believe has authority to receive it." (*Per Lord Coleridge, L. C. J., in Finch v. Bowing*, 4 C. P. D. 146.) When there is a place of business and a person is conducting the business there a tender made to such person there is as good as a tender to the principal. (*Moffatt v. Parsons*, 5 Taun. 307; *Bingham v. Allport*, 1 Nev. & M. 398.) But if at the time the tender is made the person to whom it is made expressly disclaims authority to take it, "the tender is made at the peril of him who makes it, because should it turn out that the person to whom it was made had no authority to receive the money, the tender will be bad." (*Per Lord Coleridge in Finch v. Bowing, supra.*) There Lord Coleridge held, Denman, J. dissenting, that when the amount payable as a composition of a debt was tendered to the clerk of the creditor who was a solicitor, and the clerk refused to receive the money, saying that his master was out and that he had "no instructions," the tender was good. *Bingham v. Allport, supra*, upon which Denman, J. relied, must be carefully considered in connection with this case.

To whom tender to be made.

Tender of a part of one certain debt is inoperative (*Dizon v. Clarke*, 5 C. B. 365). Of course where several causes of action are combined together, as they may be, a defendant may plead a tender as to one or more of them.

A debtor cannot apply a set-off in reduction of the amount due so as to make the tender of the balance good. (*Searle v. Sadgrave*, 5 E. & B. 639; 25 L. J. Q. B. 15.)

A tender of more than the sum due, requiring change, is bad (*Betterbee v. Davis*, 3 Camp. 70); but a tender of too much without requiring change is good. (*Read v. Goldring*, 2 M. & S. 86.)

When a tender of a larger sum is bad.

As to the kind of money in which a legal tender can be made—(1) for amounts over £5 the 3 & 4, Wm. 4, c. 98, s. 6, provides that Bank of England notes shall be a good tender. (2) Gold coins issued from the mint are a good tender for any amount. (3) Silver coins for any sum not exceeding 40s. (4) Copper coins for any sum not exceeding 1s. A county bank note should not be tendered; but if it is tendered and the party objects, not to the kind of payment offered, but refuses to take it on some other ground, the tender may be good, for a party must rely on the objection he states, and he will be taken to have waived any other objection. (*Poglass v. Oliver*, 2 C. & J. 15; *Lockyer v. Jones*, Peake, 239.)

In what kind of money it must be made.

The actual production of the money due is necessary, unless the creditor dispenses with the production of it at the time, or does something equivalent to a dispensation. (*Thomas v. Evans*, 10 East, 101.) The

Money must generally be

Trade Mark (a).

1. Claim for Infringement of a Trade Mark.

1. The defendant has infringed the plaintiff's trade mark.
2. The trade mark is [*describe it*].
3. The following are the acts complained of [*set them out*].

The plaintiff claims an injunction to restrain the defendant, his servants, and agents from infringing the plaintiff's said

produced,
and no
condition
imposed.

Quære,
Is debtor
entitled to
a receipt?

Trade
marks,
recent legis-
lation as to.

tender must be unconditional. An offer of payment, clogged with a condition that it should be accepted as the balance due, does not amount to a legal tender. (*Evans v. Judkins*, 4 Camp. 156; *Hough v. May*, 4 Ad. & E. 954.) A tender of the full amount demanded, accompanied with a protest, is good (*Scott v. Uxbridge & Rickmansworth Rail. Co.*, L. R. 1 C. P. 596); but not so if the tender cannot be accepted without supplying an admission that no more is due (*Bowen v. Owen*, 11 Q. B. 130); so where a tender is accompanied with a demand of a receipt in full of all demands. (*Ryder v. Townsend*, 7 D. & Ry. 119.) There was no little discussion in a number of old cases as to whether a debtor when paying his debt can demand a receipt at all; but by the 33 & 34 Vict. c. 99, s. 123, the payee of money is subject to a penalty, if in any case where a receipt would be liable to duty he refuses to give a stamped receipt; and therefore, where the debt is £2 or over, the practical effect is that the debtor may claim a receipt.

(a) By the Patents, Designs, and Trade Marks Act, 1883 (the 46 & 47 Vict. c. 57), the former Trade Mark Acts are repealed. By section 77 no person is entitled to bring any action in respect of the infringement of a trade mark unless it has been registered under the provisions of the Act, or unless in the case of trade marks in use before the 13th of August, 1875, registration thereof has been refused under this Act, or any repealed Act. Registration of a person as proprietor of a trade mark is *prima facie* evidence of his right to the exclusive use of it, and after *five years* it is conclusive evidence of his title (s. 76). Section 64 provides (1) For the purposes of this Act, a trade mark must consist of, or contain, at least one of the following essential particulars: (a) a name of an individual or firm, printed, impressed, or woven, in some particular and distinctive manner; or (b) a written signature, or a copy of a written signature, of the individual or firm applying for registration thereof as a trade mark; or (c) a distinctive device, mark, brand, heading, label ticket, a fancy word, or words not in common use. (2) There may be added to any one or more of these particulars, any letters, words, or figures, or combination of letters, words, or figures, or any of them. (3) Provided that any special and distinctive word or words, letter, figure, or combination of letter figures, or of letters and figures, used as a trade mark before the 13th day of August, 1875, may be registered as a trade mark under this part of this Act. "A trade mark shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill" (s. 70).

In *Johnston & Co. v. Orr, Ewing & Co.*, 51 L. J. Ch. 797, it was decided by the House of Lords that an imitation of a trade mark will be restrained by injunction if it is likely to deceive the ultimate purchaser of goods. Where the plaintiffs had acquired a trade mark for goods manufactured for the Indian market, the defendants were restrained

trade mark, and in particular from [*stating any particular injunction sought*]. The plaintiff also claims an account or damages.

Defence.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

Reply.

The plaintiff joins issue on the defence.

2. Claim by Assignee of a Trade Mark for its Infringement.

1. The defendant has infringed the plaintiff's trade mark.
2. The trade mark is [*briefly describe it*].
3. The said trade mark was registered by one A.B. of C. on the 10th of June, 1880, and was assigned and transmitted by the said A.B. to the plaintiff on the 3rd of November, 1880, in connection with the goodwill of the business of a brewer at C. aforesaid, which was conveyed by the said A.B. to the plaintiff on the said date.

4. The following are the acts complained of [*set them out*].

The plaintiff claims an injunction to restrain the defendant, his servants, and agents from infringing the plaintiff's said trade mark. The plaintiff also claims an account or damages.

from the use of a mark, calculated to be mistaken for the plaintiffs, by ignorant natives, though not by anyone in the trade or able to read English. (*Ibid.*)

In the *Singer Manufacturing Co. v. Wilson*, 3 App. Cas. 376; 47 L. J. Ch. 481, it was intimated by the Lord Chancellor and Lord O'Hagan (Lord Blackburn doubting) that fraud is not necessary to be alleged or proved in order to obtain protection for a trade mark. In that case it was decided that a manufacturer using, to describe articles made by him, the name of another manufacturer, must justify the use thus made of a name not his own, by shewing that such name is understood by the trade and the public to denote a patented or other article, type, structure, or arrangement of parts, and not a mark or sign of a particular manufacturer. An injunction will be granted to restrain a trader from sending out to the public articles of his own manufacture in bottles or casks, having indelibly impressed thereon the name of another trader, who manufactures an article of a like description, even although such trader place on such bottles or casks a label having his own name thereon. (*Rose v. Lister*, 47 L. J. Ch. 576.)

Whether fraud necessary to support action of imprisonment.

Trespass to goods (a).

1. *Claim for Trespass and Injury to a Horse.*

The plaintiff has sustained damage by the defendant on the 1st May, 1880, wrongfully taking a horse belonging to the plaintiff out of the plaintiff's stable at A—, and riding the same for a distance of twenty miles at full speed, whereby the said horse became broken winded, and was rendered wholly useless to the plaintiff.

The plaintiff claims £50 damages.

Defence.

1. The defendant prior to the said 1st May, 1880, received from the plaintiff a general permission to ride the said horse whenever he wished, and he rode him on the said 1st of May, by the leave and licence of the plaintiff under the said authority.

2. The defendant did not ride him for twenty miles at full speed as alleged, but at a moderate and usual pace.

When trespass lies.

When not.

Plaintiff must have actual or constructive possession.

Fact of possession *prima facie* evidence of right to possession.

(a) In order to support an action for trespass to chattels, the act of the defendant need not be intentional (*Collivill v. Reeves*, 2 Camp. 575), as when a defendant accidentally injures a chattel belonging to another. It will lie for beating a horse or other animal belonging to the plaintiff. (*Slater v. Swan*, 2 Str. 872.) So for the complete destruction of a thing as well as an injury to it. (Co. Lit. 57. a.) But the action does not lie for an indirect interference with the owner's possession, as by locking the door of a room or place in which the goods are placed or otherwise preventing the plaintiff's having access to them. (*Hartley v. Mozhan*, 3 Q. B. 701; *Thoroughgood v. Robinson*, 6 Q. B. 769.)

The plaintiff must have the actual or constructive possession of the goods at the time of the trespass to be able to maintain the action, or at least a legal right to the possession. (*Bulme v. Hutton*, 9 Bing. 471, 477.) A special or temporary right to the present possession, as that of a hirer or carrier of goods or a bailee, who has actual possession at the time of the taking, injury, or destruction is sufficient to support the action (*Collivill v. Reeves*, *supra*), even against the absolute owner or bailor. (*Briery v. Kendall*, 17 Q. B. 936; *Turner v. Hurdcastle*, 31 L. J. C. P. 193.) The fact of possession is *prima facie* evidence of the right to the possession, and is therefore sufficient to maintain the action against a wrongdoer who cannot show a better title, or authority under a better title. (*Ellis v. Kempe*, 7 M. & W. 212.) Therefore, except in the case of an authority under a better title, a defendant will not be allowed to set up the *jus tertii* to rebut the title of the person in possession at the time of the trespass. But if the plaintiff had not the actual possession at the time of the trespass, the defendant may set up the *jus tertii*. (*Ib.*) See generally *Armory v. Delamirie*, 1 Smith L. C., 7th ed., 357.

By 3 & 4 Wm. 4, c. 42, s. 29, the jury may in this action give damages in the nature of interest over and above the value of the goods.

Reply.

1. The plaintiff joins issue upon the defence.
2. Before the said 1st May, the plaintiff had revoked the permission mentioned in the 1st paragraph of the defence.

Rejoinder.

The plaintiff joins issue upon the reply.

2. Claim for Trespass and Injury to Chattels.

The plaintiff has suffered damage by the defendant on the 10th of April, 1880, wrongfully removing from the plaintiff's apartments at 10, Gower Street, a portmanteau containing a quantity of wearing apparel, and placing them in a damp cellar whereby they have become mildewed and damaged.

- The plaintiff claims £60 damages.

Trespass to Land (a).

1. Claim for Trespass to Plaintiff's Land.

1. The plaintiff is the owner in fee and occupier of a close of land, in the parish of A. in the county of B.
2. On the 5th of March, 1880, the defendant broke and entered the plaintiff's said close and trespassed on the same,

(a) Every entry upon land in the occupation or possession of another is a trespass, unless it can be justified in the exercise of some legal or personal authority or some incorporeal right. Such an entry as will constitute a trespass is said to be committed when one man throws stones, rubbish, or materials of any kind on the land of another, or allows his cattle, poultry, or domestic animals to go thereon. So it is a trespass to pour water out of a pail on to another man's yard; to fix a spout so as to discharge water on to another's land; to suffer filth to ooze through a boundary wall; to run over the close of another. Equally it may be a trespass to drive a nail into a neighbour's wall, or to place anything against the wall, so as to shoot on to his land.

What amounts to a trespass upon land.

The action will lie though the trespass was unintentional, and though no damage to the plaintiff was really done; but in the latter case the damages given by the jury would probably only be nominal. If, however, the entry is made after notice and warning not to trespass, or is a wilful and impertinent intrusion on another's privacy, then exemplary damages will be recoverable (*Merest v. Harvey*, 5 Taunt. 443); and where there is a continuing trespass, as where a man throws a heap of stones or builds a wall or plants posts or rails on his neighbour's land, and there leaves

There may be a trespass though it was unintentional, and no damage done.

and broke down and removed a gate which the plaintiff had erected across a private road thereon.

3. On the 10th of March, 1880, and on various other days

them, an action will lie against him for the trespass, and the right to sue will continue from day to day till the trespass is removed.

Action for a continuing trespass.

An action may be brought for the original trespass in placing the incumbrance on the land, and another and subsequent action for continuing the thing so erected, for the recovery of damages in the first action does not operate as a purchase of the right to continue the injury. (*Holmes v. Wilson*, 10 Ad. & E. 503; *Boyer v. Cook*, 4 C. B. 236.)

Who the proper plaintiff.

[*Who may bring the action.*]—Where the owner of the land is also the occupier of it, he is the proper plaintiff; but where, as often happens, the land is let on lease or otherwise, then the tenant or occupier and not the landlord has the *prima facie* right of suing for the trespass, which is an injury to his right of possession. If, however, the reversionary interest of the landlord is in any way injured by the trespass, as where the injury done by the trespasser is of a permanent nature and deteriorates the marketable value of the property, so that if the landlord or reversioner were to sell it, it would fetch less money in the market—in such a case the landlord can sue for the damage done to his reversionary interest, either along with the tenant suing for the injury done to his possessory interest, or by himself. Suppose a trespass on land out on lease and an injury to trees. There the lessor might sue for the damage done to the body of the tree, the lessee for the loss of shade and fruit. (*Brdingfield v. Oslove*, 3 Lev. 209.) So in an ordinary estate of copyhold, where the property in the trees and minerals is in the lord, and the possession in the copyholder, if a stranger cuts the trees or takes the minerals, the lord can bring trover and the copyholder can maintain trespass. (*Eardley v. Granville*, 3 Ch. Div. 826; 45 L. J. Ch. 669.) A reversioner cannot maintain an action against a stranger for entering upon land in the occupation of his lessee, and with carts and horses trampling down the soil and grass, though the entry be made in the exercise of an alleged right of way, as such an act done while the premises were out on lease would not be evidence of any right of way as against the reversioner, and thus no permanent injury would be inflicted on the reversion. (*Barter v. Taylor* 4 B. & Ad. 75; *Choper v. Crabtree*, 19 Ch. Div. 197; 51 L. J. Ch. 544.) Where the plaintiff claims damages as a reversioner for an injury done to his reversion, the statement of claim must allege it to have been done to the damage of the reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto. (*Barter v. Taylor*, 4 B. & Ad. 74; *Jackson v. Pecked*, 1 M. & S. 234.)

But not when the enjoyment of tenant affected.

The plaintiff must have a present possessory title.

Passing by the case of the action by the reversioner for damage to his reversionary interest, which, after all, is not an action for trespass, the rule must be observed that in order to maintain an action for trespass the plaintiff must have a *present possessory title*. Therefore, even the owner of the land trespassed on, as the heir-at-law, cannot sue in this action before he has entered into possession of his land; but after entry the right of possession relates back so as to support an action against a wrongdoer for a trespass committed at an antecedent period. (*Barnet v. Earl of Guilford*, 11 Exch. 19; 24 L. J. Ex. 281.)

When one joint tenant or tenant in common may sue the other.

An action is maintainable by one tenant in common against his co-tenant or the licensee of the latter for digging up and carrying away the soil of the close of which they are tenants in common. So for turning him or his servants off the land or out of the house holden in common; but except where the act complained of really amounts to an eviction of the plaintiff by the defendant, or a destruction of some portion of the land, an action of trespass will not lie by one joint tenant or tenant in

before the bringing of this action, the defendant accompanied by his servants and workmen again broke and entered the said close, trespassed on the same, and cut down and removed a gate which was across the said private road.

common against another, or for any matter done on the land held in common. (*Cubitt v. Porter*, 8 B. & C. 257; *Sedman v. Gwilli*, 8 E. & B. 1; *Jacobs v. Seward*, L. R. 4 C. P. 328; 5 H. L. 464.) In the latter case it was held where two persons are tenants in common of a field, the merely putting, by one of them, a lock upon the gate (not shown to be kept locked) will not constitute an ouster so as to enable the co-tenant in common to maintain trespass. See also *Watson v. Gray*, 14 Ch. Div. 192.

The owner of the soil may have an action of trespass against one entitled to rights over the surface for acts of trespass not justified by the exercise of such rights. (*Earl of Lonsdale v. Rigg*, 26 L. J. Ex. 196.) Thus the owner of land subject to a highway over it may maintain an action for any act amounting to a trespass upon it other than a user of it as a highway. (*Lade v. Shepherd*, 2 Str. 1004.)

Trespass in cases of divided ownership.

In *Coverdale v. Charlton* (4 Q. B. Div. 104; 48 L. J. Ch. 128), it was decided that when a highway is vested in a local board it has such a right of property in and on and in respect of the soil that it is enabled as owner to bring a possessory action against trespassers. The Court of Appeal in *Rolls v. Ventry of St. George the Martyr of Southwark*, 14 Ch. Div. 796, expressed its concurrence in this decision, but held that when streets, being highways, are vested in a vestry or local board, the latter have an interest in them only so long as they are highways, and that when they cease to be highways, by being legally stopped up or diverted, the interest of the vestry or local board determines.

A person is not justified in entering the land of another against his will for the purpose of the sport of fox-hunting (*Paul v. Summerhay*, 4 Q. B. D. 9; 48 L. J. M. C. 33); and it may be open to some doubt whether a person could justify a trespass on the ground that his only object was to destroy noxious animals which could not otherwise be got rid of. (*Ibid.*)

Prior to the legislation of 1870 trespass was an action of a local nature, which could only (except with leave) be tried in the county in which the land is situate. Now local venues are abolished, and the plaintiff may bring his action in any county, subject to the power of a judge or master at chambers, upon the application of the defendant, to change the venue.

Defences.—1. "A trespass may be excused altogether if it can be shown that it was committed in self-defence, in order to escape from some pressing danger or apprehended peril, or in defence of the possession of a man's goods and chattels or cattle, sheep or domestic animals." (*Addison on Torts*, 4th ed. 264.)

Trespass in self defence.

2. A man is also justified in trespassing on the land of another, where, owing to the neglect of that other in not keeping in a proper state of repair fences which it was his duty to maintain, his cattle have got on to the other's land. In that case neither the person who goes to take the cattle away nor the owner of the cattle is guilty of any trespass. (2 Roll. Abr. Trespass, 565, pl. 3.)

To retake cattle when a defence.

3. The defendant may plead that the close or land on which the trespass was committed was not the soil and freehold of the plaintiff, and then the plaintiff's title to the property is in issue, and also his right to the possession; but it is not enough for the defendant to show that the plaintiff who is in possession is not the true owner. He must either show that he is himself the right owner, or that some third person is, by whose authority he, the defendant, acted when he committed the trespass complained of. (*Jones v. Chapman*, 2 Ex. 803; *Purnell v. Young*, 3 M.

Denial of the plaintiff's property. When denial of the plaintiff's pro-

The plaintiff claims :—

(1.) An injunction restraining the defendant, his servants, and workmen, from any repetition of the acts complained of, and,

(2.) Damages.

erty a
defence.

Defence of
leave and
licence.

Defence
that defen-
dant has
an ease-
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How
easements
arise.

Ways of
necessity
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& W. 283.) It is sufficient if the defendant proves that he is owner of only part of the close, provided the alleged trespasses were committed on that part only. (*Smith v. Royton*, 8 M. & W. 381.)

4. Another defence is that the trespass was committed by the leave and licence of the plaintiff. Leave given by parol can generally be withdrawn at any time, and after it is withdrawn the defendant cannot justify any act under it; but whenever a person has been induced to lay out money upon the land of another, upon the faith of a verbal agreement, that in consideration of the expenditure the person laying out his money shall have an easement, privilege, or profit upon the land, the privilege could not at equity, and now cannot at all, be withdrawn by the landlord without making full compensation for the expenditure. (*Gale on Easements*, 5th ed. 76—83.) But a licence given by a tenant to his landlord to enter upon the demised premises and eject him without any process of law is void, as authorising the commission of an act which is made illegal by the 5 Rich. 2, s. 1, c. 8, *Edwick v. Hawkes*, 18 Ch. D. 199.

5. The most common defence to an action for trespass is that the defendant has obtained an easement, as a right of way, upon and over some portion of the plaintiff's land, and that it was in the exercise of such right that the trespass complained of was committed. An easement is created either by grant, or it arises by prescription. Again, easements created by grant are either created by express grant, which must be by deed, or by implied grant. In the former case there can be little difficulty; the pleader sets out the effect of the easement granted, and shows by proper averments on the face of his pleading that the act complained of was an act within the right granted. As to the construction of express grants of easements, see *Barkshire v. Grubb* (18 Ch. D. 616), and the cases quoted therein (*Newcomen v. Coulson*, 5 Ch. D. 133; 46 L. J. Ch. 459).

Grants of easements are implied in the following cases :—

Ways of necessity.—Whenever one man grants land to another to which there is no access except over the land of a stranger, or over the land of the grantor—in such a case the grantee obtains a right of way over the land of the grantor; and if the owner of two closes having no way to one of them but over the other, parts with the latter without reserving the way, it will be reserved to him by law as a way of necessity. (*East Co. Rail. Co. v. Darling*, 5 C. B. N. S. 821; 22 L. J. C. P. 202; *Gayford v. Moffatt*, L. R. 4 Ch. App. 133.) The way of necessity presumed to be reserved to the grantor of a piece of land entirely surrounded by other land conveyed by him is not a general right of way, but is merely a right of way necessary for the mode in which the land was used at the time of the grant. Thus where at the time of a grant certain landlocked closes were used for agricultural purposes only, it was held that the lessee of such closes was not entitled to any other than a way of necessity for agricultural purposes. (*Mayor of London v. Riggs*, 3 Ch. Div. 798; 48 L. J. Ch. 297.) But a way of necessity is said to be commensurate only with the existence of such necessity, so that where a person who has a way of necessity over the lands of another is able to approach the land for which the way was used by passing over his own soil, the way is extinguished. (*Holmes v. Goring*, 2 Bingh. 76.)

Defence.

1. The defendant says that there is a public highway for horses and carriages and foot passengers over the plaintiff's said close from O. to P., and that prior to the said 5th of March,

It, however, revives again when the necessity for it revives (*Pearson v. Spencer*, 1 B. & S. 584); and easements of necessity are not extinguished by unity of ownership. (*Ib.*)

Continuous and apparent easements.—It has been already stated, in dealing with easements generally, that when an owner of two closes parts with one of them, there passes, by implication of law, a grant of all those continuous and apparent easements which have been, and were at the time of the severance, used by the owner of the entirety for the benefit of the parcel granted.

Where easements are not created by grant, express or implied, they must arise by prescription, and prescription is of three kinds. (1) Prescription at common law: (2) Prescription under the Prescription Act (2 & 3 Wm. 4, c. 71). and (3) Prescription arising from a lost grant.

Prescription at common law.—The right is here claimed by immemorial use, the averment, in strictness, being that the defendant and those whose estate he hath have enjoyed the right from time whereof the memory of man runs not to the contrary. The date of legal memory is now fixed at the beginning of the reign of Richard I., and what follows from that is this, that although upon proof of an exercise of the right for twenty years, the Court will in the first instance presume the right in favour of the defendant, yet if the plaintiff can show that there was *any* period of time (since the reign of Richard I.) when the defendant could not possibly have enjoyed the right, the defence is at an end. Suppose a right of way is claimed to a house by immemorial user, and proof is given that for thirty years the defendant has enjoyed the right, up to this point the defendant has a *prima facie* case, but it is liable to be displaced by the plaintiff proving that the house in question was not more than 100 years old, and could not therefore have existed in the time of Richard I. The consequence is that the defence of prescription by immemorial user is of little value, except when some right is claimed over lands, the history of which does not go farther back than it can be shown the defendant enjoyed the right claimed.

The owner of a right of way by immemorial user, for the purpose of access to his land, is only entitled to use such right of way for the purpose of the enjoyment of his land in the state in which it has always been, and not for all purposes, and he cannot, by altering the character of his land, as by building houses upon agricultural land, acquire a right to use the way for the new purposes for which he requires it, the rule being that no such change can be made in the character of the dominant tenement as will increase the burden on the servient tenement. (*The Wimbledon and Putney Commons Conservators v. Dixon*, 1 Ch. D. 362 (C.A.); 45 L. J. Ch. 353, following *Williams v. James*, L. R. C. P. 577; 36 L. J. C. P. 256.) And so the user of a way to a field for twenty years for agricultural purposes does not give a right to use it for mineral purposes. (*Bradburn v. Morris*, 3 Ch. D. 812.)

Prescription by statute.—The statute 2 & 3 Wm. 4, c. 71, gives with respect to a specified class of easements, a mode of acquisition far more easy than that mentioned above. By this statute if a person enjoys *uninterruptedly and as of right a profit à prendre*, or right of common for thirty, or a right of way or watercourse for twenty years next before the commencement of the suit in which the question of the validity of

Kinds of prescription.

At common law.

The value of a defence of prescription at common law.

The prescriptive rights given by statute.

1880, the plaintiff wrongfully erected a gate across the said highway for the purpose of obstructing and preventing, as in fact he did, the use of the same by the public.

Periods to be excluded from the computation of time.

Difference in pleading common law and statutory prescription.

The "enjoyment" meant by the statute.

Essential that the easement continue to time of action.

Prescription by lost grant presumed after 20 years' user.

the easement arises, then the easement is not liable to be defeated by proof that it had its origin on this side of the reign of Richard I.; and when a *profit à prendre* or right of common has been enjoyed for *sixty* and a right of way or watercourse for *forty* years, an indefeasible title is obtained, unless it is shown the right in question has been enjoyed by virtue of some deed. The time during which a party capable of resisting the claim is an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, is to be excluded from the computation of the terms of *thirty* and *twenty* years; and the time during which any land or water upon, over, or from which any right of way or watercourse shall have been enjoyed, has been held under any term for life or of years exceeding three, is excluded in the computation of the period of *forty* years, on condition that the claim is resisted by the reversioner within three years after the determination of the term. It must be noticed that this Act is confined to certain classes of easements—rights of way, watercourse, *profits à prendre*, rights of common, light, air; and therefore a title based upon a twenty years' enjoyment as of right can only be pleaded with respect to a right that is *ejusdem generis*, with one of the rights specified. In pleading prescription at common law, it is enough to aver that the defendant, &c., has enjoyed the right from time immemorial; no averment as to the nature of the enjoyment is necessary; but in pleading under the Prescription Act it should be averred that the right was enjoyed uninterruptedly during the twenty years and of right, or it should be specifically stated that the plaintiff or defendant, as the case may be, claims the particular right under the provisions of the 2 & 3 Wm. 4, c. 71, s. 2.

The enjoyment meant by the statute is "an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right; or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent, or agreement, contract, or licence in case of a plea for twenty years." (Per Cur. *Tickle v. Brown*, 4 Ad. & E. 369, 312. See further *Clay v. Shackeray*, 2 M. & Rob. 244; *Gayford v. Moffatt*, L. R. 4 Ch. 133; *Partridge v. Scott*, 3 M. & W. 220.) It need not be proved in the case of prescription at common law that the easement continued down to the time of the suit; but this is essential in cases within the statute. In fact if there were proof of enjoyment for fifty years down to within a few years of action brought, when it ceased there would still not be enough to satisfy the statute. (*Parker v. Mitchell*, 11 Ad. & E. 788; *Lowe v. Carpenter*, 6 Exch. 825; L. J. 20 Ex. 374.)

Prescription by lost grant.]—The third way of proving prescription is by averring that some owner of the servient tenement, by a grant which is now lost, granted to the defendant or an ancestor the easement claimed. Where this is pleaded the jury may, from acts of ownership extending back over not less than twenty years, presume that the lost grant once existed, and find a verdict for the defendant accordingly. This mode of acquiring an easement has advantages of its own, and is a useful one. It is not necessary to aver and prove the continuance of the user up to the time of action brought, nor will evidence that the defendant's right had its origin within legal memory affect it, as in the case of prescription at common law. It is often advisable to allege prescription by each one of the three modes indicated.

2. Whereupon the defendant in the exercise of his rights as one of the public, upon the occasions referred to in the statement of claim, cut down and removed the said gate, and passed along the said highway, which are the acts of trespass alleged.

Reply.

The plaintiff joins issue upon the defence.

2. Claim for Trespassing on Land in Pursuit of Game.

1. At the time of the committing of the acts complained of the plaintiff was and still is possessed and in the occupation of certain lands situate on S. Common, in the county of C.

2. On the 13th of April, 1876, the defendants entered and trespassed upon the said land in search and pursuit of game.

The plaintiff claims :—

- (1.) £50 damages.
- (2.) An injunction restraining the defendants from any repetition of the acts complained of.

Defence.

1. The defendants deny that they committed the alleged trespass.

2. The defendants say that the land whereof the plaintiff claims to be possessed, situate on S. Common, was at the time of the alleged trespass the freehold of one M. N., and that the defendants on the said 13th of April, 1876, by the leave and licence of the said M. N., entered upon the said land, which is the grievance complained of.

3. Claim by Occupiers for Trespass to Land.

1. The plaintiffs were at the time of the committing of the grievances hereinafter mentioned in occupation of certain land situate at P., in the parish of C., in the county of L.

2. On the 8th of May, 1876, the defendant by himself and his servants wrongfully broke and entered the said land of the plaintiffs, and broke down a certain fence which had been erected by the plaintiffs on the said land, and trampled and injured the crops of the plaintiffs growing upon the same,

and the defendant threatens to repeat and continue the said trespasses.

The plaintiffs claim :—

- (1.) £100 damages for the said trespass.
- (2.) A perpetual injunction to restrain the defendant, his servants and workmen, from continuing or repeating the said trespass.

Defence.

1. The defendant denies that at the time mentioned in the statement of claim the plaintiff was in the occupation of the said lands.

2. At the time of the alleged trespass there was and of right ought to have been a common and public highway over the said land where the alleged trespass was committed for all persons to go and return on foot, and with horses and carts, all times of the year from A. to B., and the defendant in the exercise of his right as one of the public entered upon the plaintiff's said land and broke down a fence which was then obstructing the said highway, which is the grievance complained of.

3. The defendant further says that as the occupier of a farm called "K." immediately adjoining the plaintiff's said land, he is entitled to a right of foot-way and carriage-way over the plaintiff's said land, and from A. to B. The defendant claims such right of way—

- (a.) Under the provisions of the 2 & 3 Wm. IV. c. 71, s. 2.
- (b.) By prescription at common law, and
- (c.) By reason of a lost grant.

4. The defendant at the time of the alleged act of trespass had entered upon the plaintiff's land in the exercise of his said right of way, and he broke down and removed a fence which obstructed his passage along it. The defendant did not trample on or injure the plaintiff's crops.

Reply.

The plaintiff joins issue upon the statement of defence.

*in common against another for
a Party-wall.*

are at the time hereinafter
on of a party-wall separating
ifton Street, Bristol, from the
ton Street, Bristol.

1880, the defendant broke down
said wall whereby the plaintiff has

£100 damages.

Defence.

on the 10th of April, 1880, was the property
at, and was not a party wall in which the plaintiff
rest.

Reply.

plaintiff joins issue upon the statement of defence.

5. Trespass to the Plaintiff's Yard.

1. The plaintiff was, at the date of the acts hereinafter com-
plained of, and still is, the owner and occupier of a certain
yard situate at the back of the G. Inn, at B., in the county of
C., and he has suffered damage by the acts mentioned in the
following paragraphs.

2. The defendant has wrongfully placed a stone step in the
plaintiff's said yard, in front of his said house, and has con-
tinued to keep the said stone step there till the present time.

3. The defendant also placed and fixed a scraper in the said
yard, and has continued to keep the scraper so placed there till
the present time.

4. The defendant also fixed a drain-pipe in the wall of his
house, which projects over the said yard, and from which water
and refuse are discharged by him into the said yard.

The plaintiff claims:—

- (1.) £100 damages;
- (2.) An injunction ordering the defendant, his servant and

agents, to desist from committing the said nuisances, or others of a like nature, and commanding them to remove the said stone step, pipe, and scraper.

6. *Claim by Occupier of Land for Trespass and Owner for Trover.*

1. The plaintiff A.B. is the owner of a field called E. in the parish of F., in the county of G., and the plaintiff C.D. is the tenant and occupier thereof.

2. On the 1st of May, 1880, the defendant broke and entered the said field and trespassed therein, and cut down and removed and converted to his own use two oak trees growing thereon.

The plaintiff A.B. claims £—— damages for the conversion of the said trees.

The plaintiff C.D. claims £—— damages for the said trespass.

7. *Claim by Lord of the Manor for Trover and Occupier of the Land for Trespass.*

1. The plaintiff A.B. is the tenant and occupier of a farm of copyhold tenure in the manor of Z. The plaintiff C. D. is lord of the said manor.

2. The defendant, on the 10th of June, 1879, broke and entered the said farm and trespassed thereon, and cut down and removed a fir-tree growing thereon.

The plaintiff A.B. claims damages for the said trespass.

The plaintiff C.D. claims damages for the conversion of the said tree.

8. *Claim for Trespass to a Mine, and Trover of a quantity of Coal.*

1. The plaintiffs are the owners in fee of certain lands in the parish of C., in the county of D., under which are valuable seams of coal, which they are engaged in working.

2. The defendants on divers days between the 1st of May, 1879, and the 5th of November, 1879, broke into and entered upon the said mines of the plaintiffs, and dug levels in and worked the said mines, and dug up and carried away and con-

verted to their own use large quantities of the plaintiffs' coal and erected barriers and other obstructions in and upon the said mines, whereby the plaintiffs have been prevented from having access to and working their mines and getting coal therefrom, and have been hindered in carrying on their business as colliery proprietors.

The plaintiffs claim :—

- (1) Damages for the trespass and conversion of the said quantities of coal ;
- (2) An injunction restraining the defendants, their servants or workmen, from repeating the acts complained of.

9. Claim for Trespass to Land, and Defence of a Way of Necessity.

1. The plaintiff is the owner and occupier of P. Farm, in the county of A.

2. On the 1st of January, 1880, the defendant broke and entered the said farm and trespassed thereon with a horse and cart, and has threatened to repeat the said acts of trespass in the assertion of an alleged right of way.

The plaintiff claims an injunction restraining the defendant, his servants and workmen, from any repetition of the said acts of trespass.

Defence.

1. On the 20th of July, 1879, the defendant was the owner of the P. Farm, now the property of the plaintiff, as well as of a farm called T., which he now occupies. The defendant's farm, called T., at that time was and still is completely landlocked by the plaintiff's said farm, and for a long time the defendant, his tenants and servants, in going to and from the said T. farm, on foot and with carts and horses, were compelled to pass along a road which traversed the P. farm.

2. On the said 20th of July the defendant conveyed the said P. farm to the plaintiff.

3. The defendant submits he is entitled to a right of foot-way and carriage-way on the said road to and from the said T. farm into the main road at L.:—

- (a) As a way of necessity ;

(b) By reason of an express reservation of such right of way in the deed of conveyance of the said 20th of July.

4. At the time mentioned in the statement of claim the defendant entered upon the said road in order to pass from the said T. farm into the main road at L. as he had been accustomed to do, and not otherwise, which is the grievance complained of.

Reply.

The plaintiff joins issue upon the statement of defence.

Trover (a).

1. Claim for Conversion of Goods.

The plaintiff has suffered damage by the defendant wrongfully depriving the plaintiff of two casks of oil, by refusing to give them up on demand.

When
trover lies.

(a) This action lies for damages for the conversion, as it is called, of the plaintiff's goods, and in order to maintain it the plaintiff must show : 1st. That he had a general or special property in the goods and an actual or constructive possession or right of possession. 2nd. A wrongful conversion by the defendant ; and 3rd. Damages, being the value of the goods.

As to property and possession as essentials in action.

Property and possession.—Where there is a general and special owner, but the general owner has not transferred his right to the possession, he may maintain the action, as where the latter delivers possession to a carrier, for in these cases the bailee is only the servant of the bailor (*Gordon v. Harper*, 7 T. R. 12). However, the plaintiff must show that he had a right to the immediate possession in order to maintain this action. Thus, if the goods are let for a term unexpired (*Gordon v. Harper, supra*; *Cooper v. Willomatt*, 1 C. B. 672), or where they are in the possession of a person having a lien on them (*Millgate v. Kebble*, 3 M. & Gr. 100), the general owner cannot maintain the action. In these cases the bailee would be the proper person to sue, unless he has done something which determines the bailment, in which case the right to the immediate possession by the bailor or general owner arises, and the latter then becomes the proper person to sue for a conversion. (*Bryant v. Wardell*, 2 Ex. 479; *Fenn v. Bittleston*, 7 Ex. 152.)

In the case of bailments which do not exclude the bailor from the right of immediate possession, such as a gratuitous loan or deposit, either the bailor or bailee may maintain the action. (*Nichols v. Bastard*, 2 C. M. & R. 659; *Turner v. Hardcastle*, 31 L. J. C. P. 193.)

A bailee or other person having a special property may, under some circumstances, maintain the action against the person having the general property in the chattel, as where the former delivers it back to the latter for a temporary purpose, he may after that purpose is satisfied, if the

Particulars :—

Two casks of oil, value £20 each, £40.

The plaintiff claims £50.

former refuse to re-deliver it, maintain the action against him. (*Roberts v. Wyatt*, 2 Taunt. 268.)

A joint owner or tenant in common of goods cannot maintain this action against a co-owner in respect of any act of the latter not inconsistent with his ownership; but if the latter does an act inconsistent with the joint ownership, such as a complete destruction of the goods (*Jacobs v. Seward*, L. R. 5 H. L. 464), or a sale in market overt (*Barton v. Williams*, 5 B. & A. 403; *Harper v. Godsell*, L. R. 5 Q. B. 422), this amounts to a conversion of them, for which the other part owner can sue him in this action—at least, as regards the plaintiff's undivided part in the case of a sale. It has been held that the removal of entire chattels by one tenant in common without the consent or knowledge of the other, for the purpose of selling and appropriating the proceeds to his own use (*semble*, as opposed to an actual sale), does not amount to a conversion, though the removal has created a lien on them by a third party. (*Jones v. Brown*, 25 L. J. Ex. 345.)

Another instance of the rule that the owner of goods to which he has not the right of immediate possession cannot maintain this action, is that where goods are sold without credit, the buyer cannot maintain trover for them unless he has tendered the price, though by the agreement to purchase, the property has vested in him (*Bloxham v. Sanders*, 4 B. & C. 941; *Martindale v. Smith*, 1 Q. B. 389; *Page v. Ebljee*, L. R. 1 P. C. 127, 145); or even where the goods are sold on credit, but with an arrangement for their delivery by instalments. In this case, if the vendor becomes insolvent before all the instalments become due, the vendee cannot maintain trover for any instalment which has become due until he has tendered the price of any already delivered and not paid for, as well as that in reference to which the action is sought to be maintained. (*Ex parte Chalmers*, L. R. 8 Ch. 289; 42 L. J. Bank. 2; *Morgan v. Bain*, L. R. 10 C. P. 15; *Ogg v. Shooter*, L. R. 10 C. P. 159; *In re Phoenix Bessemer Steel Co.*, 4 Ch. D. 119; 46 L. J. Ch. 115.) So where the vendor of goods sold on credit stipulates for a lien until payment, though he gives vendee access to the goods by means of a key of the place where they are warehoused, to which the vendor also has access. (*Millgate v. Keble*, 3 M. & Gr. 100.) In such circumstances the purchaser cannot maintain trover even as against a wrong doer. (*Lord v. Price*, L. R. 9 Ex. 54.)

On the other hand, a person who has a special ownership may maintain the action where he has the right to immediate possession, such as an agister of cattle (Br. Abr. Tresp. 67), or a sheriff in possession under an execution. (*Ex parte Williams*, L. R. 7 Ch. 314.) But a landlord who distrains and impounds goods cannot maintain the action, as the goods are in the custody of the law. (*Moneax v. Goreham*, 2 Selw. N. P., 10th ed., 1351; and see *Turner v. Ford*, 15 M. & W. 212, per Parke, B.)

A person having a special property in chattels may, in some circumstances, maintain the action though the goods may have never come into his possession, as a factor to whom goods have been consigned, but by whom they have never been received. (*Fowler v. Down*, 1 B. & P. 47; and see *Evans v. Nichol*, 3 M. & G. 614; *Morison v. Gray*, 3 Bing. 260; and *Sargent v. Morris*, 3 B. & A. 277, for other instances.)

Mere possession is sufficient to support this action by the person who had possession against a wrongdoer who cannot show a better title in

When a joint owner may sue co-owner for conversion.

Vendee of goods not paid for cannot sue vendor for refusal to deliver them.

Special property gives right to sue.

Mere possession

2. Claim by Trustee in Bankruptcy for Conversion of Horses.

1. The plaintiff is the trustee of the estate of A. B. of C., who was adjudicated a bankrupt on the 3rd of May, 1880.

2. Prior to the said 3rd of May, 1880, the said A. B. de-

sufficient
against
wrong-
doers.

himself, or an authority to keep possession under a better title. (*Armoury v. Delamirie*, 1 Sm. L. Cas. 7th ed. 357; *Elliott v. Kemp*, 7 M. & W. 312.) So the finder of goods, though picked up in the house of a third person. (*Bridges v. Hawkenworth*, 21 L. J. Q. B. 75. See for other instances *Sutton v. Buck*, 2 Taunt. 302; *Buckley v. Gross*, 32 L. J. Q. B. 129; *Burton v. Hughes*, 2 Bing. 173; *Northam v. Borden*, 24 L. J. Ex. 237; *Rouse v. Brenton*, 8 B. & C. 737; *Taylor v. Parry*, 1 M. & Gr. 604; *Branker v. Melyneux*, 3 M. & Gr. 84; *Bourne v. Fubronke*, 34 L. J. C. P. 164.)

What
constitutes
conversion.

[*What constitutes conversion.*]—Conversion is constituted either by an act of direct conversion or by a demand by the plaintiff and a refusal by the defendant to deliver the goods to him. An unlawful taking of the goods out of the possession of the owner is a conversion (*Purvell v. Hayland*, 20 L. J. Ex. 82), provided the taking and detention be with the intention to convert them to the use of the taker or of some other person, or has the effect of destroying or altering their quality or nature; for a mere trespass, not interfering with the owner's dominion of the property, is not a conversion. An unauthorised act which deprives another of his property permanently or for an indefinite time, is a conversion. (*Hiett v. Hott*, L. R. 9 Ex. 86, 89.) The using a thing without the permission of the owner may amount to a conversion. (*Keyworth v. Hill*, 3 R. & L. 687.) Thus the wearing of a pearl. (*Petre, Lord v. Henrue*, 12 M. & L. 519.) It has been suggested that the conversion of a part is not conversion of the whole if the remainder continues in a fit state to be delivered up. (*Philpott v. Kelly*, 3 Ad. & E. 106, per Patteson and Coleridge, JJ.)

When mis-
delivery by
carrier a
conversion.

The misdelivery of goods by a carrier is a conversion. But delivery in the ordinary course of business at a place directed, is no conversion, although the goods were delivered to a person not intended by the sender. (*McKean v. McIvor*, L. R. 6 Ex. 36.) So if a carrier after refusal to accept the goods at the consignee's address misdelivers them to another person, this is not a conversion if he has acted with reasonable care and caution with reference to such goods. (*Hough v. L. & N. W. Rail. Co.*, L. R. 5 Ex. 51.) Where goods were by mistake consigned to the defendant, who by his act, though *bonâ fide*, enabled a third person to obtain delivery of them, whereby they were lost to the owner, this was held to be a conversion by the defendant. (*Hiett v. Bdr.*, *supra*.)

Assignee
or vendee
of goods
from per-
son having
no title.

Taking goods by assignment from a person having no right to assign them, is a conversion by the assignee. (*Marston v. Phillips*, 9 L. T. N. S. 289.) *Nempe*, however, there should be a demand and refusal in such a case. (*McCombie v. Davies*, 6 East, 538.) A person may of course dispose of goods fraudulently bought, but the sale is invalid, and a person to whom they afterwards come through various regular and *bonâ fide* sales, and who breaks them up, is liable in trover to the true owner. (*Fowler v. Hollins*, L. R. 7 Q. B. 616, 633, Ex. Ch.; 7 H. L. 757. But when the plaintiff is not the owner of goods but has only a special property in them, as that of a pledgee, and he is induced by a fraudulent representation to part with his special property, he cannot follow them into the hands of the defendants who have obtained them *bonâ fide* and for good consideration. (*Baheack v. Lawson*, 4 Q. B. Div. 394; 5 Q. B. Div. 284; 48 L. J. Q. B. 408.)

livered two roan cab-horses to the defendant that he might break them.

3. He did not re-deliver them to the said A. B., and the plaintiff

So where a person is induced to part with his goods by fraud, the contract is voidable, and he can recover back the goods; but if the person who has fraudulently obtained the goods part with them to a *bonâ fide* purchaser, the purchaser can hold the property against the person defrauded. (*Cundy v. Lindsay*, 3 Appeal Cases, 459; 47 L. J. Q. B. 481.) In the latter case the Court held that the plaintiff never intended to part with the property in the goods, and therefore the action was maintained against the defendant who was a *bonâ fide* purchaser from the thief; but the law was stated to be clear that when the original owner has parted with the chattel to A. upon a *de facto* contract, though there may be circumstances which will enable that owner to set aside that contract, the *bonâ fide* purchaser from A. will get an indefeasible title. See also on this subject *Hardman v. Booth*, 1 H. & C. 803; *Higgins v. Burton*, 26 L. J. Exch. 342; *Moyce v. Newington*, 48 L. J. Q. B. 125, 4 Q. B. D. 32. The true owner of goods is entitled to follow them into the hands of a pawnbroker with whom they have been *bonâ fide* pawned, and sect. 25 of the Pawnbrokers Act of 1872, which provides that "the holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn-ticket, and he is thereby indemnified for so doing," only governs the rights between pawnbroker and customer. (*The Singer Manufacturing Co. v. Clark*, L. R. 5 Ex. Div. 37; 49 L. J. Ex. 224.)

The rights of a *bonâ fide* purchaser.

The Factor's Act, 1877 (the 40 & 41 Vict. c. 39) confers in certain circumstances a good title upon persons buying or making advances on goods or documents of title to goods in the usual and ordinary course of mercantile business.

The destruction of property by the defendant is a conversion if done with the intention of destroying or appropriating it. In the hands of a bailee the destruction through accident or mere carelessness of the bailee is not a conversion; but it is otherwise if so destroyed while in the wrongful possession of the defendant, though not with his privity, or if it is damaged while he is exercising a dominion over it inconsistent with the rights of the real owner. (*Heald v. Carey*, 21 L. J. C. P. 97.)

Destruction when a conversion.

Demand and refusal.—A demand and refusal are evidence of a conversion, but this is only presumptive evidence, which is capable of being rebutted, as by showing that at the time of the demand the defendant could not deliver the goods. (*Smith v. Young*, 1 Camp. 441.) Again, if a person finds a chattel, a refusal to deliver to the real owner until he proves his title is not necessarily evidence of conversion. (*Guntton v. Nurse*, 2 B. & B. 447; *Clark v. Chamberlain*, 2 M. & W. 78). "The defendant was somewhat in the position of a finder of lost property, and the trover, or finding, is innocent unless it is followed by conversion." (*Per Grove, J., in Spackman v. Foster*, 11 Q. B. Div. 101.) In such cases, if it appear that there was a *bonâ fide* doubt as to the title, and that only a reasonable time was taken for the purpose of clearing the doubt, it would not be a conversion. (*Burroughs v. Bayne*, 29 L. J. Ex. 185, 191, *per* Bramwell, B.) So a refusal by a servant of a company to deliver goods without the order of the company is not a conversion. (*Alexander v. Southey*, 5 B. & A. 247.) Again, where a person on a demand made on him to deliver a document does not deny the right of the person demanding it, but says it is in the hands of his solicitor, this answer is not evidence of a conversion. (*Towne v. Lewis*, 7 C. B. 608;

When demand and refusal a conversion.

since his appointment as trustee has demanded them, but the defendant has refused to deliver, and has sold them and converted the proceeds of the sale to his own use.

The plaintiff claims £150 damages.

Where goods attached in defendant's hands.

and see *Canot v. Hughes*, 2 N. C. 448.) And where the goods which are the subject of the action have been attached by the order of a Court, in an action against a person who had the goods in his possession as hirer and deposited them with the defendant, a refusal to deliver them by him is not a conversion. (*Verrall v. Robinson*, 2 C. M. & R. 495.) This decision seems inconsistent with the case of *Pillott v. Wilkinson*, 34 L. J. Ex. 22, Ex. Ch., where the defendant, a wharfinger or warehouseman, who had goods in his possession which had been attached, and whose clerk, on a demand made of them by the plaintiff, to whom the depositor had given a warrant for them, merely said there was a difficulty, as there was an attachment, and the defendant himself merely asked for time, but did not refuse to deliver, was held guilty of a conversion.

Refusal by agent.

Refusal by agent, &c.—A refusal by the defendant's general agent is not sufficient to constitute a conversion, but if an agent acts under the special instructions of the principal, his refusal is sufficient. (*Pothier v. Dawson*, Holt, N. P. 383.) But it has been held that a refusal by the shop servant or by the wife of the defendant is sufficient without any express directions from him. (*Cutterall v. Kenyon*, 3 Q. B. 310.)

What is a demand.

What necessary to constitute a demand.—A demand of the value of the goods is sufficient. (*Thompson v. Shirley*, 1 Esp. 31.) This is, however, a very old case. It has been held that a demand to re-deliver in the same condition as when it came into defendant's possession is not sufficient. (*Rushworth v. Taylor*, 3 Q. B. 699.) And a demand of "fixtures" is not sufficient as regards things which are not fixtures.

Measure of damage.

Measure of damages.—The amount of damages is the value of the chattel, and the price paid by a solvent vendee on a *bond fide* sale is the criterion of value. (*France v. Gaudet*, L. R. 6 Q. B. 199, 204.) But the amount realized on discounting a bill converted by the defendant is not such a test, and the plaintiff is entitled to its full amount. (*Alsager v. Rose*, 10 M. & W. 576.) Where an unpaid vendor is sued for conversion by the vendee, the measure of damages is the difference between the agreed price and the actual value. (*Chinery v. Viall*, 29 L. J. Ex. 180.) And where a pledgee converts the security wrongfully, the measure of damages in an action against him by the owner is the difference between the amount advanced and the actual value. (*Johnson v. Stear*, 33 L. J. C. P. 130; approved of in *Donald v. Suckling*, L. R. 1 Q. B. 585; and *Halliday v. Holgate*, L. R. 3 Ex. 299, Ex. Ch.) In trover for fixtures which have been severed, their value when severed as opposed to their value as incident to the structure, is only recoverable. (*McGregor v. High*, 21 L. T. N. S. 803, *per* Keating, J.) Special damages over and above the value are, however, recoverable. (*Bodley v. Reynolds*, 8 Q. B. 779; *Wood v. Bell*, 25 L. J. Q. B. 148, 231. But see *Balme v. Hunter*, 9 Bing. 477, Ex. Ch.)

By 3 & 4 Wm. 4, c. 42, s. 29, the jury is empowered in this action to give damages in the nature of interest above the value of the goods.

DEFENCES.

Defences : *Denial of plaintiff's title.*—The defendant when he is not a bailee or agent may set up the title of a third person (*Leake v. Loveday*, 4 M. &

1. Denial

Defence.

1. The defendant at the time of the making of the agreement hereinafter mentioned had a lien on the said horses to the amount of £109 4s. for money payable to the defendant by the

Gr. 972); and he may do so where he is an agent or bailee, when the bailment has been determined, or where a third person claims the goods. (*Biddle v. Bond*, 34 L. J. Q. B. 137.) The right of a third person cannot be set up when such person has abandoned his right. (*Bettely v. Reed*, 4 Q. B. 511. And see *Nicholson v. Cooper*, 27 L. J. Ex. 393.) A mere wrongdoer cannot set up the *jus tertii*. (*Jeffries v. Great Western Rail. Co.*, 25 L. J. Q. B. 107.)

Lien.]—A right to a lien on the goods, whether special or general, and a right to the possession of them until the claim is satisfied, is a good defence to conversion consisting of refusal to deliver.

A special lien is generally created by the person in whose possession it is bestowing labour on it, for the amount of his charges for such labour; as a miller with regard to the flour he grinds, a tailor the clothes he makes, a shipwright with regard to a ship repaired by him. An innkeeper has a lien on the goods of his guests for his charges, but he may not detain the clothes of his guest, as that would be equivalent to an imprisonment. (*Sunbolz v. Alford*, 3 M. & W. 248.) His lien extends to the goods of a third person brought to the inn, if they be such as a person might ordinarily be expected to travel with. (*Threfall v. Borwick*, L. R. 7 Q. B. 711; aff. in Ex. Ch. L. R. 10 Q. B. 210.) If, however, the innkeeper knows the thing belongs to a third person, he has no lien on it. (*Broadwood v. Granara*, 10 Ex. 417.) It seems the lien extends to everything for which the innkeeper would be liable in the event of loss. (*Threfall v. Borwick*, *supra*.) A livery-stable keeper has no lien on horses for their food, but it is otherwise with regard to an innkeeper, unless he receives them in his character as livery-stable keeper only. (*Allen v. Smith*, 31 L. J. C. P. 306.) A trainer has a lien on the horses entrusted to him. (*Bevan v. Waters*, M. & M. 236.) Vendors of goods not sold on credit have a lien for the price on them (see *Grice v. Richardson*, 3 Appeal Cases, 319); and where the purchaser has obtained possession by giving a cheque which is subsequently dishonoured, he may maintain trover for them. (*Hewse v. Crowe*, Ry. & M. 414.)

It is no answer to a special lien that the plaintiff has a set-off of a higher amount than the claim on which the lien is founded, unless there has been an agreement that one is to be deducted from the other. (*Pinnock v. Harrison*, 3 M. & W. 532; *Weguelin v. Collier*, L. R. 6 H. L. 286.)

A general lien may be proved by evidence of express agreement between the parties or of their mode of dealing, or of the general usage of other persons engaged in the same employment or trade of such notoriety that it may be assumed to be known to the owner of the goods. The instances of the usage should be numerous and important. (*Rushforth v. Hadfield*, 6 East, 526.) The following persons have a general lien:—Wharfingers for their general balance (*Spears v. Hartly*, 3 Esp. 81); calico printers (*Weldon v. Gould*, 3 Esp. 268); bankers for their general balance upon securities, which, however, do not include title deeds (*Wylde v. Radford*, 33 L. J. Ch. 51, 53); nor securities contained in boxes deposited at the bankers for safe keeping only, and to which he has not access. (*Lecoe v. Martin*, L. R. 17 Eq. 224.)

Solicitors have a general lien on papers coming into their hands in the course of professional business. (*Stevens v. Blakelock*, 1 M. & S. 535.) But a solicitor to the official liquidator of a company being wound up

of plaintiff's title.

2. Lien.

What is a special lien.

Vendors of goods sold for cash.

General lien.

Bankers.

Solicitors.

said A. B. for and in relation to the breaking-in and training of the said horses and for their keep.

2. Whilst the said horses were in the possession of the defendant for the purposes aforesaid, and before the said A. B.

has no lien for his costs on the file of proceedings in the winding-up and the documents relating thereto (*Ex parte Pulbrook*, L. R. 4 Ch. 627); nor to the books of account of a bankrupt as against the trustee.

Carriers.

As to the lien of carriers, see *Wiltshire Iron Co. v. Great Western Rail. Co.*, L. R. 6 Q. B. 776, 777, Ex. Ch.) A usage of carriers to retain goods under a general lien as against the consignee will not interfere with the consignor's right to stop *in transitu*. (*Oppenheim v. Russell*, 3 B. & P. 42.) And a right of lien against a consignor will not justify retention as against the consignee. (*Butler v. Woolcot*, 2 N. R. 64.)

By the 97th section of the Railway Clauses Consolidation Act, 1845, railway companies who have incorporated that Act into their special Act. are empowered on non-payment "of tolls due to them in respect of any carriage or goods" to detain and sell such carriage or goods, or in case of their removal from the company's premises, any other carriages or goods belonging to the party liable to pay such tolls, and out of the proceeds to retain the amount due for tolls, and the charges and expenses of the detention and sale. This provision only applies to the property of persons or companies running their own waggons, &c., on the company's lines, and not to goods carried by the company as carriers. (*Wallis v. London & South-Western Rail. Co.*, L. R. 5 Ex. 62.)

Insurance brokers.

Insurance brokers have a general lien for balances even as against an agent, unless they have notice that he is an agent. (*Maass v. Henderson*, 1 East, 335; *Fisher v. Smith*, 4 App. Cas. 1.) Factors have a general lien on goods which come into their hands as factors. (*Dixon v. Mansfield*, 10 C. B. 399.)

The English consignee of a West Indian plantation has a lien on the plantation in respect of a balance due to him from the proprietor of the plantation. (*Chambers v. Davidson*, L. R. 1 C. P. 296, 305.)

When a general lien has been judicially established in the case of any class of persons or traders, it becomes a part of the law merchant, and judicial notice must be taken of it. (*Brunsdon v. Barnett*, 3 C. B. 519, 530.)

Waiver or dissolution of lien.

[*Waiver or dissolution of lien.*]—If a person on a demand of the goods, instead of relying on the lien, claims them as his own, or claims to hold them for a debt due to a third party, he thereby loses his lien. (See *Boardman v. Sill*, 1 Camp. 410, n.; and *Dirks v. Richards*, 4 M. & Gl. 574.) So if a person having a particular lien claims to hold the goods for two distinct liens (*Kerford v. Mendel*, 28 L. J. Ex. 303); or for an old balance as well. (*Jones v. Tarleton*, 9 M. & W. 615.) Parting with the possession generally destroys the lien (*Scott v. Newington*, 1 M. & Rob. 252); even though they afterwards come lawfully into the creditor's possession (*Hartly v. Hitchcock*, 1 Stark. 408; *Jones v. Pearle*, lb., 556); or though they are taken by the sheriff in execution at the lien holder's suit against the owner (*Jacobs v. Latour*, 5 Bing. 130); or where, after delivering them to a carrier, he afterwards stops them *in transitu*. (*Swelt v. Pym*, 1 East. 4.) A shipowner entitled to a lien on goods until the delivery of good bills for the freight, having taken and negotiated a bill for the freight, this was held to have destroyed the lien. (*Horncastle v. Farran*, 3 B. & A. 497.)

Where goods fraudulently removed.

If the goods are fraudulently taken out of the possession of the person having a lien, if he without force retakes possession his lien revives. (*Wallace v. Woodgate*, Ry. & M. 193.) Though an insurance broker who parts with the policy on which he has a lien loses the right, yet if it again

was adjudicated a bankrupt, an agreement in writing was made between the said A. B. and the defendant that the defendant should have liberty to sell the said horses for the best price he could obtain for them, and retain out of the purchase-money any sum which he was entitled to by way of lien on the said horses.

3. The defendant sold the said horses in pursuance of the said agreement, and the proceeds of the said sale, viz., £50 were not sufficient to satisfy the defendant's said lien.

3. *Claim for Trover of a Watch.*

The plaintiff has suffered damage by the defendant wrongfully depriving him of a gold watch belonging to the plaintiff, and converting the same to his own use after a demand from the plaintiff for its delivery.

The plaintiff claims £40 damages.

Defence.

The defendant bought the said watch in the city of London in market overt, and he became the purchaser *bonâ fide*, and without any knowledge that the plaintiff was the true owner thereof.

Reply.

1. The plaintiff joins issue upon the defence.

2. He says further that the said watch was stolen from him by one A. B. The said A. B. was on the 11th of September, 1880, prosecuted to conviction by the plaintiff, and on the day following and when the said watch was in the defendant's possession the plaintiff demanded delivery of the same, and such delivery was refused.

comes into his possession his right revives. (*Levi v. Barnard*, 8 Taunt. 149.)

Though the claim by virtue of which a person is entitled to a lien becomes barred by the Statute of Limitations, this does not destroy the lien. (*Spears v. Hartly*, 3 Esp. 81.)

Stoppage in transitu.—The right which an unpaid vendor has of stopping goods *in transitu* to the purchaser before delivery may be set up in an action by the vendee against the vendor. The subject of stoppage *in transitu* has been referred to under the title of "*Stoppage in transitu*." See further, *Lickburrow v. Mason*, 1 Smith's Lead. Cas., 7th ed., 756.

Bar of debt does not affect lien.

Stoppage *in transitu*.

4. Claim by Owner and Borrower of a Chattel for its Conversion.

1. On the 1st of January, 1880, the plaintiff A. B. lent to the plaintiff C. D. a phaeton, the property of the plaintiff A. B.

2. While the said phaeton was in the possession of the said plaintiff C. D., the defendant seized the same and removed it from the premises of the plaintiff C. D., and though both the plaintiffs A. B. and C. D. demanded its return, sold it and converted the proceeds to his own use.

The plaintiff A. B. or in the alternative the plaintiff C. D. claims £100 damages.

Defence.

1. At the time when the defendant seized and removed the said phaeton the plaintiff C. D. was tenant of the defendant's house in Mayfair, and a large sum was then due and owing to the defendant in respect of arrears of rent.

2. The defendant distrained upon the said premises for the said arrears of rent and seized the said phaeton which was sold in due course, and the proceeds applied to the payment of the said arrears of rent.

3. The defendant denies that the plaintiff A. B. had at the time of the said distress or sale any property whatever in the said phaeton.

Reply.

The plaintiff joins issue upon the statement of defence.

5. Claim against a Pawnbroker for Loss of a Pledge.

The plaintiff has suffered damage by the defendant failing to re-deliver to him a silver trophy cup which he deposited with the defendant as security for an advance, and which he demanded from the defendant before action brought, accompanying such demand with a tender of the monies advanced and all interest.

Particulars of damage :—

Value of the said cup £75

The plaintiff claims £75.

Defence.

1. The said cup while in the defendant's custody was destroyed by an accidental fire originating on adjoining premises, and extending to the defendant's shop without any negligence on his part.

Reply.

The plaintiff joins issue on the statement of defence.

Trusts (a).*Breach of Trust.*

1. By a settlement dated July 3rd, 1872, on the marriage of the plaintiffs' father and mother, of which the defendants A. B.

(a) By the 7th section of the Statute of Frauds it is enacted that "all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Trusts to be proved by writing.

The statute extends to copyholds and leaseholds, but not to chattels personal, and it cannot be invoked by a defendant to support a fraud. (*Davis v. Otty*, 35 Beav. 208.)

Note that the statute does not require trusts to be declared in writing, but only that they shall be proved by some documentary evidence. (*Forster v. Hall*, 5 Ves. 315.)

Trusts are *express*, *implied*, or *constructive*.

Express private trusts are executed or executory; in the latter case, *i.e.*, when the person creating the trust has merely indicated his intention in general terms, leaving the Court to effect the necessary conveyance and settle the proper limitations, more regard is had to the intention of the creator of the trust than in the former case, where he has carefully acted as his own conveyancer. An express trust, if voluntary, will not be enforced by the Courts unless it has been perfected by conveyance, or the donor has constituted himself a trustee for the donee, or has done all in his power to perfect the assignment. (*Kekewich v. Manning*, 1 De G. M. & G. 176. Cf. *Baddeley v. Baddeley*, 9 Ch. Div. 114.) Of course a voluntary conveyance may be avoided if fraudulent against creditors under 13 Eliz. c. 5, or against purchasers under 27 Eliz. c. 13, or the Bills of Sale Act, 1882, or the Bankruptcy Act, 1883. Trusts for the benefit of creditors are revocable except as against such creditors as have been informed of the existence of the trust and have thereupon borne to exercise their legal rights against the debtor. (*Johns v. James*, 8 Ch. Div. 744.)

Classification of trusts.

For the creation of a trust three things must be certain. The words used must be imperative or certain, and the objects and subject-matter of the trust must likewise be certain. "If," said Lord Langdale, M. R.,

Requisites to creation of a trust.

and one C. D. were trustees, the plaintiffs are absolutely entitled to the settled property on the deaths of their father and mother.

2. On August 5, 1874, C. D. died, and the defendant E. F. was appointed in his place.

in *Knight v. Knight*, 3 Beav. 172, 11 Cl. & Fin. 513, "the giver accompanies his expression of wish or request by other words from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any indefinite part of the subject from the object of the request, or if the objects are not such as may be ascertained with sufficient certainty, no trust is created." (Cf. *Hutchinson v. Tennant*, 8 Ch. Div. 540; *Dawson v. Lord Penrhyn*, 4 App. Cas. 51.)

Purchasers were formerly under an onerous liability to see to the application of purchase or other moneys paid to trustees without the consent of their *cestuis que trusts*, but it is now provided by s. 36 of the Conveyancing and Law of Property Act, 1881, as follows: "The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects, payable, transferable, or deliverable to them or him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof. This section applies to trusts created either before or after the commencement of this Act." The former statutes on the same subject applied only to money.

Resulting trusts.

Resulting trusts arise where a purchaser takes a conveyance or assignment in the name of a stranger, who in such a case is held to be a mere trustee for the person who really paid the purchase-money. But this would not be so if the purchaser intended a gift, or the relationship of the parties was such that the law would presume an intention by the purchaser to advance the person in whose name he took the conveyance. The presumption of advancement arises where the person in whose name the purchase is taken is the legitimate child of the purchaser, or the latter stands towards him or her *in loco parentis*. It likewise arises when a husband purchases in the name of his wife. (*Curran v. Jago*, 1 Coll. Ch. Cas. 261; *Re Eykyn's Trusts*, 6 Ch. Div. 115; *Bennett v. Bennett*, 10 Ch. Div. 474.)

A resulting trust also arises where the settlor conveys property on trusts which do not exhaust the whole estate conveyed. (*Pannell v. Ilington*, 3 Sm. & Giff. 344.)

If it should happen that the person beneficially entitled, whether as settlor entitled to a resulting trust in his favour, or as *cestui que trust*, should die intestate, without heirs or next-of-kin, a distinction is to be observed. If the property is realty, the trustee takes it beneficially, but if it be personalty, the Crown takes it as *bona vacantia*, unless the trustee is also executor. Since the statute 1 Will. 4, c. 40, where a testator makes no disposition of his personal estate (which vests in his executor), as to wills made after Sept. 1, 1830, the executor is to be deemed by the Court of Equity to be a trustee for the persons, if any, who would be entitled, under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will that the executor was intended to take beneficially. The executor is now bound, as against the next-of-kin, to show that it was intended that he should take beneficially. (*Harrison v. Harrison*, 2 H. & M. 237.)

Implied trusts.

Implied trusts may arise out of joint-tenancies upon purchases or mortgages made by two or more jointly, and out of commercial purchases, as to which see Snell on Equity, 5th ed., p. 133.

3. On December 1st, 1879, the plaintiffs' father died.
 4. On January 1st, 1880, the plaintiffs' mother died.
 5. The defendants have committed the following breaches of trust by—
- (a.) Sale of £3000 Bank Stock and investment of the proceeds in the business of the defendant A. B. ;

Constructive trusts, *i.e.*, trusts which arise by construction of equity, apart from the intention of the parties, as in the case of equitable liens, such as a vendor's lien for unpaid purchase-money, a vendee's lien for prematurely paid purchase-money, and a trustee's or part owner's lien for charges in preserving or renewing the trust property, are the third class.

It is beyond the scope of this note to state the whole of the rules of law and equity which have been held applicable to the office of a trustee. Any one of the *cestuis que trusts* is entitled to bring his action against the trustee to have the trusts carried into execution, subject, of course, to the risk of being compelled personally to bear the costs of the action, if it should turn out to be frivolous or vexatious.

It may be laid down generally that the duty of a trustee is to take the same care of the trust property as a prudent person would take of his own property. He is further bound to follow all the directions contained in the instrument or instruments creating the trust. In a very recent case, *Speight v. Garnet*, 22 Ch. Div. 727, which, however, is now under appeal to the House of Lords, the law was explained by the Court of Appeal:—"A trustee is bound to conduct the business of the trust in the same way in which an ordinary prudent man of business conducts his own, and has no further obligation. He may employ brokers and agents in cases in which they are employed in the ordinary course of business." In this case a trustee, with the consent of his *cestuis que trust*, employed a broker for the investment of £15,000 of the trust funds in Corporation Stocks. On the day before the next settling-day the broker brought to the trustee a bought note and obtained the £15,000 from him, on the statement that the money would have to be paid next day. The space left in the bought note for the date of the settling day was not filled up, and no charge was inserted for commission. The broker never acquired the securities, but appropriated the money to his own purposes, as was discovered about a week afterwards, when he became bankrupt. A few days after the payment the trustee had inquired of the broker whether the securities were ready, and was told it would take some time to obtain them. On subsequent occasions similar excuses were given. There was evidence that about a fortnight was generally required to get corporation bonds completed when obtained direct, the broker holding, in the meantime, a banker's receipt for the money. Evidence was given that the form of the bought note would indicate to brokers, though probably not to others, that the bonds were to be procured from the corporation direct:—Held (reversing the judgment of *Bacon, V.-C.*) that the trustee, having acted in the ordinary course of business, was not liable to make good the loss occasioned by the embezzlement of the trust moneys by the broker.

Constructive trusts.

Duties of trustees.

Unless expressly awarded it by the person creating the trust, a trustee is not allowed any remuneration. "A trustee shall not profit by his trust." Even if he be a solicitor, he may only have his costs out of pocket, that is, in the absence of a stipulation in the will or deed creating the trust that he shall be allowed to charge for his professional services. Such a clause will only allow him to charge for services strictly profes-

Trustees not entitled to remuneration.

- (b.) Sale of leasehold property worth £5000 to G. H. for £1000 (without taking any proper steps to ascertain its value, or to obtain such value).

The plaintiffs claim—

- (1.) The replacement of £3000 Bank Stock and £5 per cent. interest on the proceeds of the Bank Stock sold from the date of sale till replacement ;
- (2.) Payment of £4000 and interest at £5 per cent. per annum from the date of the sale.

Trustee may bargain for remuneration.

sional, and not for acts which an executor or trustee need not employ a solicitor to do. (*Harbin v. Darley*, 28 Beav. 325.) There is, however, nothing to prevent a person bargaining before he accepts the office of trustee that he should be remunerated for his trouble. (*Ayliffe v. Murray*, 2 Atk. 58.) Upon the principle that a trustee may not profit by his trust, a trustee may not reserve to himself the shooting over the trust estate, or charge the nominal value if he buy up debts at an undervalue, nor use the trust fund in trade, paying interest for it. These remarks apply to constructive trustees, as agents, as well as to express trustees.

Trustee's receipts.

The extent and limits of the liability of one trustee for the receipts of another are explained in the notes to the leading case of *Townley v. Sherburne*, 2 Wh. & Tudor's Lead. Cas. p. 870. A mere receipt given for the sake of conformity imposes no liability on the trustee if his co-trustee should embezzle the money expressed to be received.

Unauthorised investments.

A trustee is liable for any loss resulting from improper investments. (Cf. Lewin on Trusts, 252, *et seq.*) The trustee may be charged by the Court with more than £4 per cent., or even with compound interest, in some cases of breach of trust. It is not easy to lay down any positive rules as to the manner in which the discretion of the Court will be exercised, but the result of the cases is stated by a learned author (Snell on Equity, p. 167) to be that more than £4 per cent. will be charged in the following cases :—

- (1.) Where the trustee ought to have received more, or where he had improperly called in a mortgage carrying 5 per cent. ;
- (2.) Where he had actually received more than 4 per cent. ;
- (3.) Where he must be presumed to have received more, as if he has traded with the money, in which case the *cestui que trust* has at his option to take the profits actually obtained ;
- (4.) Where the trustee is guilty of direct breaches of trust or gross misconduct.

See also *Emmet v. Emmet*, 17 Ch. Div. 142.

Powers of trustee.

As to the power of executors and trustees to pay, compound, and compromise debts and claims, see the Conveyancing and Law of Property Act, 1881, by which it is enacted, s. 37 :—

- (1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient ;
- (2.) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument if any creating the trust, a sole trustee is authorised to execute the trusts and powers thereof, may if, and as he or they think fit, accept any composition or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt,

Execution of Trust.

1. By a settlement dated June 10th, 1856, upon trust for A. B. and C. B. respectively for life, with remainder for their children who should attain 21, the following property was assured :—

- (a.) A sum of £5735 14s. 2d. Consolidated £3 per Cent. Annuities ;
- (b.) £4000 invested on mortgage of land at X—— ;

account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3.) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.

The remedy of a *cestui que trust* against a trustee for breach of trust may be barred by acquiescence or waiver (*Re Cross, Haytor v. Tenison*, 20 Ch. Div. 109) on the part of the *cestui que trust* not under disability, or by the fact that the *cestuis que trust*, even if under disability, procured the commission of the breach of trust by their own fraud, or by a release and confirmation by the *cestui que trust* acting with full knowledge of the facts of the case. (*Brice v. Stokes*, 2 W. & Tud. L. C. 870; *Stanley v. Stanley*, 7 Ch. Div. 590; *Lloyd v. Attwood*, 3 De G. & J. 650.)

Remedies
of *cestuis
que trust*.

It is now provided by the R.S.C. 1883, Order LV., for the determination of certain questions affecting trust estates, without administration of the whole trust, as follows :—The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin, or heir-at-law, or customary heir of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters :—

Determina-
tion of
questions
arising in
regard to
trusts.

- (a.) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin, or heir-at-law, or *cestui que trust* ;
- (b.) The ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others ;
- (c.) The furnishing of any particular accounts by the executors, or administrators, or trustees, and the vouching (when necessary) of such accounts ;
- (d.) The payment into Court of any money in the hands of the executors, or administrators, or trustees ;

- (c.) One-fifth of the residuary estate of D., deceased, subject to a prior life interest.
2. On August 15th, 1862, C. B. died.
3. On February 18th, 1875, A. B. died.
4. On September 10th, 1879, D. died.
5. A. B. and C. B. had five children only, of whom the plaintiff is one.

New practice for determining questions of administration.

- (e.) Directing the executors, or administrators, or trustees to do or abstain from doing any particular act in their character as such executors, or administrators, or trustees ;
- (f.) The approval of any sale, purchase, compromise, or other transaction ;
- (g.) The determination of any question arising in the administration of the estate or trust.

Any of the persons named in the last preceding rule may in like manner apply for and obtain an order for—

- (a.) The administration of the personal estate of the deceased ;
- (b.) The administration of the real estate of the deceased ;
- (c.) The administration of the trust.

The persons to be served with the summons under the last two preceding Rules in the first instance shall be the following (that is to say) :—

A. Where the summons is taken out by an executor or administrator, or trustee :

- (a.) For the determination of any question under sub-sections (a), (c), (f), or (g), of Rule 3, the persons, or one of the persons, whose rights or interests are sought to be affected ;
- (b.) For the determination of any question, under sub-section (b) of Rule 3, any member, or alleged member of the class ;
- (c.) For the determination of any question, under sub-section (c) of Rule 3, any person interested in taking such accounts ;
- (d.) For the determination of any question, under sub-section (d) of Rule 3, any person interested in such money ;
- (e.) For relief under sub-section (a) of Rule 4, the residuary legatees, or next of kin, or some of them ;
- (f.) For relief under sub-section (b) of Rule 4, the residuary devisees, or heirs, or some of them ;
- (g.) For relief under sub-section (c) of Rule 4, the *cestuis que trust*, or some of them ;
- (h.) If there are more than one executor or administrator, or trustee, and they do not all concur in taking out the summons, those who do not concur.

B. Where the summons is taken out by any person other than the executors, administrators, or trustees, the said executors, administrators or trustees.

The Court or a judge may direct such other persons to be served with the summons as they or he may think fit.

The application shall be supported by such evidence as the Court or a judge may require, and directions may be given as they or he may think just for the trial of any questions arising thereout.

It shall be lawful for the Court or a judge upon such summons to pronounce such judgment as the nature of the case may require.

The Court or a judge may give any special directions touching the carriage or execution of the judgment, or the service thereof upon persons not parties, as they or he may think just.

It shall not be obligatory on the Court or a judge to pronounce or

6. The defendants are the present trustees of the settlement.

The plaintiff claims—

- (1.) Execution of the trusts of the settlement ;
- (2.) All necessary accounts and inquiries ;
- (3.) A receiver.

Claim against Trustee for Breach of Trust in Investing the Trust Funds in Trading Speculations.

1. By the will dated the 14th of May, 1853, of A.B., deceased, and of which the defendants O., P., and Q. were and are the trustees, the sum of £10,000 was bequeathed to the defendants in trust to invest as therein mentioned, and to pay the income of the investments to X. for life, and after his death to the plaintiff and to the defendant R. in equal shares, with divers remainders over.

2. A.B. died, and the defendants O., P., and Q., who were appointed executors of his will, proved the same.

3. X. died on the 1st of June, 1870.

4. The defendants O., P., and Q. have committed the following breach of trust, viz. :—

Sale of £5,000 Bank Stock, in which the said £10,000 was invested, and investment of the proceeds in the business of the defendants O. & P.

The plaintiffs claim—

- (1.) The replacement of the £5,000 Bank Stock ;
- (2.) The profits made by the defendants O. & P. in the said business by the use of the said stock.

make a judgment or order, whether on summons or otherwise, for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order.

When any summons under Rules 3 and 4 of this order has been taken out, every subsequent summons relating to the same estate or trust shall be marked with the name of the judge to whom for the time being the matter is assigned, and in case any such subsequent summons shall be marked with the name of another judge, it shall be the duty of the executors, administrators, or trustees, to apply for the transfer to such first mentioned judge of such subsequent summons.

The issue of a summons under Rule 3 of this order shall not interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought.

Action against Trustee for Breach of Trust in regard to two Funds, claiming Interest on one Fund, and Profits made with the Other.

1. By a deed of gift made by A.B., and dated the 18th of January, 1880, the said A.B. assigned £1,000 North-Eastern Railway Stock, and £2,000 Mexican Railway Stock, to the defendant, in trust for the plaintiff.

2. The defendant has committed the following breaches of trust :—

- (a.) Sale of the North-Eastern Railway Stock and investment of the proceeds in the business of the defendant ;
- (b.) Sale of the Mexican Railway Stock and investment of the proceeds in Peruvian Stock.

The plaintiff claims—

- (1.) The replacement of the North-Eastern Railway Stock and the profits which the defendant has made with the same ;
- (2.) Replacement of the Mexican Railway Stock and payment of such a sum as represents the dividends paid thereon since the sale thereof.

Action to Enforce a Resulting Trust on a Purchase of an Estate in the Name of a Third Person.

1. On June 1, 1881, A.B., in consideration of £2,000 paid by the plaintiff to him by deed conveyed [*here describe the parcels*] to the defendant in fee simple.

2. The defendant gave no consideration for the conveyance. The plaintiff caused his, the defendant's, name to be used merely as that of a trustee for the plaintiff.

3. The defendant has entered into possession of the premises.

The plaintiff claims—

- (1.) A conveyance of the premises to him ;
- (2.) All necessary accounts ;
- (3.) Mesne profits from the [*insert date of defendant's entry into possession*] ;
- (4.) A receiver.

Defence.

The defendant says that—

1. He denies that he gave no consideration for the conveyance, or that his name was used as that of a trustee for the plaintiff.

2. The defendant is the natural son of the plaintiff, and the plaintiff has always stood *in loco parentis* to the defendant.

Claim that Defendants are Constructive Trustees for the Plaintiff on account of a Vendor's lien.

1. By an indenture dated the 14th of May, 1883, the plaintiff conveyed the Ashford Estate, in the parish of Frimley, in the county of Durham, to the defendant A. B. in fee simple. The consideration for the conveyance was agreed between the plaintiff and the defendant A. B. at £20,000, but the defendant A. B. did not on the execution of the conveyance and has not at all paid the said sum.

2. On the 14th of July, 1883, the defendant A. B. by deed conveyed the said estate to the defendant C. D. to hold to him for his life. C. D. has given no consideration for the said conveyance.

3. On the 15th of July, 1883, the defendant A. B. by deed conveyed all his estate in the premises to the defendant E. F. The defendant E. F. had at the time of the said conveyance to him notice of the plaintiff's lien on the said estate for the said sum of £20,000.

The plaintiff claims :—

- (1) £20,000 and interest thereon ; or
- (2) That he may be declared entitled to a lien on the said estate for the said sum and interest ; and
- (3) That the defendants may be restrained by injunction from selling or otherwise dealing with the said estate.

Defence of A. B.

The defendant A. B. says :—

1. He denies that the consideration for the conveyance of the estate was agreed at or was £20,000.

2. By the deed of conveyance the consideration was expressed to be, and, in fact, was, the giving of certain bills of exchange, accepted by the defendant A. B.

3. The defendant A. B. accepted and delivered the said bills of exchange to the plaintiff, who has negotiated some of them. None of them have yet matured.

4. The defendant A. B. does not admit that the defendant E. F. had notice at any time of the plaintiff's alleged lien.

Statement of Defence by C. D.

The defendant C. D. says :—

1. He has no knowledge of and does not admit any of the allegations contained in paragraph 1 of the statement of claim.

2. He denies that he gave no consideration for the conveyance to him of the 14th of July, 1883.

3. The said conveyance was made to the defendant C. D. in consideration of his guaranteeing payment of the defendant A. B.'s overdrawn account to the L. & C. Banking Company. The defendant C. D. has been compelled to pay £750 upon his said guarantee, and is still liable to pay large sums thereon.

Use and Occupation (a).

Claim by Railway Company (Purchasers) against Vendor for Use and Occupation.

1. By an agreement in writing dated the 14th of August, 1880, and made between the plaintiffs and the defendant, the

The origin
of the
action of
use and
occupation.

(a) *Use and occupation.*—This action is given by 11 Geo. 2, c. 19, s. 14, which provides that it shall be lawful for landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendants, in an action for the use and occupation of what was so held or enjoyed; and if on the trial of such action, any parol demise or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be non-suited, but may make use thereof as evidence of the quantum of damages to be recovered.

What the
plaintiff
must prove.

The plaintiff must prove—1. That the defendant came in under him or acknowledged his title by payment of rent or otherwise; 2. The occupation by the defendant; and 3. The amount of rent either expressly reserved or due on the footing of a *quantum meruit*.

defendant agreed to sell to the plaintiffs for £2,000 his warehouse and premises, No. 200, Water Lane, in the city of London, such sale to be completed on the 29th of September, 1880.

2. The plaintiffs have duly completed the sale and paid the purchase money and interest thereon from the 29th of September, 1880.

3. The defendant retained and remained in the use and occu-

Title.—If the plaintiff has not demised or given possession to the defendant, it would seem he must show that the estate was vested in him at the time from which he claims. Mortgagees may maintain this action. (*Rowson v. Eicke*, 7 Ad. & E. 151.) The owner may sue (although he has mortgaged his estate), until the mortgagee gives notice to the tenant to pay rent to him. Tenants in common may join in the action where rent has been paid to their joint agent, that being evidence of a joint letting. (*Last v. Dunn*, 28 L. J. Ex. 94.)

The plaintiff's title is generally established by the production of a writing or agreement, which is proved in the usual manner, or, in its absence, by payment of rent by the defendant or other circumstance, such as his submitting to a distress.

It would appear that there need be no interest or reversion left in the plaintiff to maintain this action, as where a person demises all the residue of his term to the defendant (*Pollock v. Stacey*, 9 Q. B. 1033), it has been held that such a demise operates as an assignment (*Beardman v. Wilson*, L. R. 4 C. P. 57.)

Occupation of defendant.—A person who has agreed to take premises but has not entered, cannot be sued in this action, as an occupation, either actual or constructive, is necessary (*Twine v. D'Heinrich*, 22 L. J. C. P. 219); and it seems that a constructive occupation will not be sufficient in the absence of an actual demise. (*Atkins v. Humphrey*, 2 C. B. 654.) An occupation prior to the date of assignment of the reversion to the plaintiff will not enable him to recover for use and occupation prior to the assignment. (*Mortimer v. Preedy*, 3 M. & W. 602.) Adverse possession by the defendant will not enable plaintiff to maintain the action, as the occupation must be with his permission. (*Trow v. Jones*, 13 M. & W. 12); but a tenancy at sufferance, arising from occupation after expiry of lease is sufficient, though the defendant continues to hold as tenant to a stranger. (*Hellier v. Sillcock*, 19 L. J. Q. B. 295.) Occupation by a third person by permission of defendant, or by his tenant or assignee, is sufficient, provided in the latter case the plaintiff has not recognized the assignee as his tenant. (*Shinn v. Dillon*, 1 Ir. R. C. L. Ex. 227.)

If two persons sign an agreement to become tenants, and one enters, both can be sued for use and occupation. (*Glen v. Dunger*, 4 Ex. 61.) But where one of two joint lessees holds over, the other is not liable for the occupation of the former. (*Draper v. Crofts*, 15 M. & W. 166.)

It is not necessary that there should be an express contract creating the relation of landlord and tenant, as it may be implied; as where a vendee enters after contract, and the sale goes off, and he remains in occupation afterwards. (See *Crouch v. Tregonning*, L. R. 7 Ex. 88; *Leggott v. Metrop. Rail. Co.*, L. R. 5 Ch. 716.) But the action will not lie where the defendant enters under an agreement for a lease, which, it turns out, the plaintiff cannot grant for want of title. (*Rumball v. Wright*, 1 C. & P. 589.)

One co-tenant who occupies a house or farm alone taking the full benefit thereof, without excluding the others, is not liable to them for

What title the plaintiff must have.

Occupation by the defendant essential.

The relation of landlord and tenant may be implied.

ration of the warehouse and premises from the 29th of September, 1880, until the 29th of September, 1881.

4. The fair value of the warehouse and premises was and is £100 per annum.

The plaintiff's claim £100.

use and occupation. *McMahon v. Burrell*, 2 Phill. Rep. 127; *Henderson v. Eason*, 12 Q. B. 986.

As to the owner's right where there has been a wrongful entry on the land, to waive the trespass and to sue for use and occupation, see *Turner v. Cameron* (1861), 5 Exch. 932.

The expiry
of plain-
tiff's title
a defence.

Defence.—Expiry of plaintiff's title.—If before the occupation in reference to which the claim is made, the plaintiff's interest has expired, this is a good defence, assuming that the defendant has paid his rent to the person claiming as against the plaintiff, as where the plaintiff's interest has become forfeited to the lord of the manor under whom the defendant has commenced a fresh holding and paid rent, after having renounced the plaintiff's title (*Balis v. Westwood*, 2 Camp. 11), or where he has paid rent to a *bona fide* claimant really entitled to the premises, under whom he has commenced a fresh tenancy (*Mountain v. Oliver*, 22 L. J. Q. B. 124); or where he has paid the rent to a mortgagee of the plaintiff under legal compulsion (*Hickman v. Machin*, 28 L. J. Ex. 310).

What
amounts to
such a
surrender
of a term as
constitutes
a defence.

Surrender accepted.—If the landlord has accepted another person as tenant, and the latter has entered with the consent of the defendant, this operates as a surrender (*Nickell v. Atherstone*, 10 Q. B. 944), even though the demise be by deed (*Darison v. Gent*, 26 L. J. Ex. 122). If the landlord has accepted the key of the premises, this operates as a surrender without the acceptance of another tenant. (*Dodd v. Achlera*, 6 M. & G. 672.) Or, if after refusal of the key, which the tenant leaves behind, the landlord enters and puts up notice that the premises are to be let. (*Phené v. Popplewell*, 31 L. J. C. P. 235.) Anything which amounts to an agreement by the tenant to abandon and by the landlord to resume possession, creates a surrender. (*Ib.*) Where a tenant on lease has quitted the demised premises before the expiration of the term, and has sent the key to the landlord with the intention of giving up possession, the mere fact that the landlord has received the key and attempted unsuccessfully to re-let does not estop him from alleging that the tenancy still subsists. And if afterwards, before the expiration of the term, the landlord re-lets the premises, the surrender by operation of law takes effect from such re-letting, and does not relate back to the original receipt of the key. (*Oastler v. Henderson*, 46 L. J. Com. Law. 607, explaining *Phené v. Popplewell*.)

In certain cases the consent of the landlord is not necessary to complete the surrender, as where furnished lodgings are let in a state unfit for occupation on account of being infested with vermin, and the tenant leaves in consequence. (*Smith v. Murrable*, 11 M. & W. 5; *Campbell v. Wenlock*, 4 F. & F. 716; *Wilson v. Finch Hatton*, 46 L. J. Q. B. 489.) This would not apply to the case of an unfurnished house. (12 M. & W. 68, 86.) A landlord omitting to repair pursuant to his covenant, whereby the premises become unfit for profitable occupation would not exempt the tenant from liability for rent in the event of his quitting. (*Boscoe*, Ev. 13th ed. 345.) But the tenant could counter-claim in damages.

Eviction
by the
landlord
from part

Eviction.—An eviction by the landlord of the tenant or his sub-tenant is a defence (*Prentice v. Elliot*, 5 M. & W. 606; *Burn v. Phelps*, 1 Stark. 94); and where the premises are let at an entire rent, eviction from part by the landlord, when the tenant quits the residue, is a good

Claim by Owner of Land for Compensation agreed to be paid by the Defendant for Occupation of Land pending a sale to him.

1. On the 24th of June, 1879, the defendant entered into possession, and has ever since continued in the use and occupation of the ——— Farm, Bexley, in the county of South-ampton, the property of the plaintiff.

defence as to such entire rent while the eviction continues. (*Morrison v. Chadwick*, 7 C. B. 266; *Upton v. Townsend*, 25 L. J. C. P. 44.) But a distinction must be observed between expulsion from a part of the premises demised and from something over which the tenant has only an easement, as in the latter case he would not by quitting exonerate himself from liability to an action for use and occupation of the other premises. (*Pellat v. Boosey*, 31 L. J. C. P. 281.) And an eviction by a stranger by title paramount from part of the premises is only a ground for having the rent apportioned

of the pre-
mises a
defence.

A threat of expulsion by a person entitled to possession and a consequent attornment or giving up possession to him are equivalent to an eviction. (*Mayor of Poole v. Whitt*, 15 M. & W. 571; *Carpenter v. Parker*, 27 L. J. C. P. 78.) But it is no eviction that the tenant left the premises in apprehension of a distress by the superior landlord. (*Rickett v. Tullick*, 6 C. & P. 66.)

Threat of
expulsion,
when
equivalent
to an
eviction.

A mere trespass is not an eviction. (*Hodgskin v. Queenborough*, Willes, 13, n. (b).) See, as to what constitutes an eviction, *Upton v. Townsend*, *supra*; *Wheeler v. Stevenson*, 30 L. J. Ex. 46; *Pellat v. Boosey*, *supra*.

A landlord cannot treat the same person as a trespasser and a tenant. Therefore where the plaintiff sued in ejectment he was held not to be entitled afterwards to sue for use and occupation. (*Birch v. Wright*, 1 T. R. 378.)

Illegality.—See several cases cited under the head of *Illegality*, *ante*, pp. 355–6, bearing on this subject.

Payment.—Where there has been an assignment of the reversion the payment of rent to the lessor before notice of the assignment is a good defence. (4 Anne, c. 16, s. 10.) But payment to the lessor before the rent day is no defence if before the rent day the defendant received notice of the assignment. (*De Nicholls v. Saunders*, L. R. 5 C. P. 589.) Where payment has been made in advance and no notice has been given before quarter-day, the advance becomes payment. (*Cook v. Guerra*, L. R. 7 C. P. 132.)

What pay-
ment is a
defence.

Payment of rates, which the tenant may deduct from the rent under 32 & 33 Vict. c. 41, s. 1, or under 37 & 38 Vict. c. 54, ss. 5, 6, 8, 9, or of the land-tax, is in effect payment by the tenant *pro tanto* of the rent next falling due. It cannot be deducted from rent falling due subsequently, at least as regards the land-tax. (*Cumming v. Bedborough*, 15 M. & W. 438.) See as to the right of deducting such sums, *Ryan v. Thomson*, L. R. 3 C. P. 144; *Duke of Devonshire v. The Barrow Hematite Steel Co.*, 46 L. J. 435 Ch.)

The amount realised by a sale under a distress would be a defence so far as such amount, but not the value of the goods distrained. If the goods have been sold at too low a rate, the defendant's remedy was formerly by a separate action (*Efford v. Burgess*, 1 M. & Rob. 23), but now an unjustifiable sale may be made the subject of a counter-claim.

2. On the 10th of January, 1880, the defendant in writing agreed with the plaintiff to purchase the said farm for £1,963, and that until the payment of the said sum he would pay £100 a year to the plaintiff for the use and occupation of the farm.

3. The defendant has refused to perform the said agreement, and has not paid the said sum of £1,963.

The plaintiff claims £400.

Defence.

1. The defendant was evicted from the whole of the farm on the 24th of June, 1880, by A. B., the true owner thereof.

9. The plaintiff's interest in the farm ceased on the 24th of June, 1880.

3. Before action, that is, on the 17th of November, 1883, the defendant tendered £100 to the plaintiff for the use and occupation of the farm from June 24, 1879, to June 24, 1880.

4. The defendant has paid the sum of £100 into Court, and says it is enough to satisfy the plaintiff's claim for the use and occupation of the farm up to the 24th of June, 1880.

Wager.

See Illegality.

Waiver.

See Landlord and Tenant—Recovery of Land.

Warehouse.

Claim for Warehouse Rent.

The plaintiff's claim is for warehouse rent for 80 hogsheads of sugar, which the plaintiff received into his warehouse at an agreed rent of £5 per month.

Particulars :—

May 1, 1876, to Rent of 80 hogsheads of

June 1, 1877. sugar at £5 a month . £65 0 0

The plaintiff claims £65.

Warranty (a)

1. *Claim for Breach of Warranty on Sale of an Engine.*

1. On the 13th of October, 1879, the defendant sold to the plaintiff for the sum of £250, which the plaintiff then paid, an

(a) A warranty upon the sale of goods is either express or implied. It need not be in writing.

Warranty
need not be
in writing.

Any representation as to the quality or description of the thing sold, which the person making it intended to be a warranty is a warranty, and if it is made at the time of the sale he is bound by it. He is, however, only liable to the extent to which he has agreed to be liable, and therefore where on the sale of a horse the seller signed the following warranty: "June 5, 1865. W. C. bought of W. G. G. a bay horse for £90, warranted sound, £90. G. G. Warranted sound for one month," it was held that the latter words limited the duration of the warranty and meant that the warranty was to continue in force for one month only, and that complaints of unsoundness must therefore be made by the purchaser within one month of the sale. (*Chapman v. Gwyther*, L. R. 1 Q. B. 463.) So when the plaintiff bought a horse by public auction at a repository, warranted to be a good worker, subject to the condition that "horses warranted good workers, whether sold by private treaty or public auction, not answering such warranty must be returned before five o'clock of the day after the sale," and the horse was not returned within the stipulated time, the decision was, that the plaintiff's only remedy was under the condition, and that he could not sue generally on the warranty. (*Hinchcliffe v. Barwick*, 5 Ex. Div. 177; 49 L. J. Ex. 495.)

Warranty by agent.—An agent or servant employed to sell a thing has not generally an implied authority to warrant. (*Brady v. Todd*, 9 C. B. N. S. 592; 30 L. J. C. P. 223.) *Quære* in the case of a foreman alleged to be a general agent. (*1b.*) It appears, however, that in the case of servants of horse-dealers they have such an implied authority, and their employers will be liable on a warranty given by them, even where there have been express directions not to warrant, unless they have notified that the general authority is limited. (*Pickering v. Bush*, 15 East, 45; *Howard v. Sheward*, L. R. 2 C. P. 148.) This doctrine does not apply to the case of an agent or servant of a person not a horse-dealer entrusted with the sale of a horse on one particular occasion. (*Brady v. Todd*, *supra*.) An auctioneer entrusted with goods for sale by public auction has no implied authority from the vendor to warrant them. (*Payne v. Lord Leconfield*, 51 L. J. Q. B. 642.)

When a
servant
may
warrant.

Where a thing is already sold a warranty given of its quality in consideration of the purchaser having bought is not binding, the considera-

A warranty
after the

engine, and at the time of such sale warranted that it was then in good working order, and that its tubes were made of brass and copper.

2. The said engine was not then in good working order, nor were its tubes made of brass and copper.

The plaintiff claims £300 damages.

sale not binding.

tion being executed, and therefore incapable of supporting any other promise than such as the law implies, and in such cases it only implies a promise to deliver on payment.

The material averments in a claim upon a warranty are: 1st, that the defendant warranted the particular article sold as being of a certain quality or description; and 2ndly, that at the time of sale it was not of the said quality or description. If special damage has resulted it must of course be set out. In an action for breach of warranty it is not necessary, nor, if the claim is upon a warranty merely, is it proper to aver that the defendant *knew* of the defect at the time he gave the warranty. If, however, the plaintiff puts his case alternatively, and relies upon a fraudulent misrepresentation as well as a warranty (as he may do when the evidence will bear him out) then the defendant's knowledge of the defect must be expressly alleged.

Implied warranties of title.—The law in many cases implies a warranty from the mere fact of a sale.

Generally no implied warranty of title.

If a man sells goods affirming them to be his own, that amounts to a warranty of title. But there is no implied warranty of title on the bare sale of a personal chattel. (*Bagueley v. Hawley*, L. R. 2 C. P. 625; *Morley v. Attenborough*, 3 Ex. 500.) The same holds on an exchange of chattels. (*La Nouvelle v. Nourse*, 3 Camp. 351.) To make the seller liable when it turns out he had no title, it must be shown that he was guilty of fraud in the transaction; and the concealment by the seller of defects in his title known to him amounts to fraud. (*Early v. Garrett*, 9 B. & C. 932.) Failing this it must be shown that there was an express warranty, or an equivalent to it, by his declarations or conduct; or that there was a usage of the particular trade by which such warranty is impliedly given. On the sale of goods in a shop kept professedly for their sale, there is an implied warranty that the purchaser has a right to sell the goods. In such a case the vendor sells the goods as his own, and that is equivalent to a warranty of title. (*Per curiam* in *Morley v. Attenborough*, *supra*.) The same holds with regard to goods sold in the defendant's warehouse. (*Eichholtz v. Bannister*, 17 C. B. N. S. 708; 34 L. J. C. P. 105.) It appears to be different with regard to unredeemed pledges sold at an auction by a pawnbroker. (*Morley v. Attenborough*, *supra*.) Or probably any auction (*Bagueley v. Hawley*, *supra*.) Where the plaintiff bought some goods from the defendant at an auction at which the defendant had himself purchased them, it was held that he could not recover the price paid for them as on a warranty of title. (*Chapman v. Speller*, 14 Q. B. 621.) An executory contract of sale of an unascertained chattel may import a warranty of title. (See *per Park, B.*, *Morley v. Attenborough*, *supra*.) Where there is no warranty and the title proves bad, the purchaser may recover the price paid as upon a failure of consideration. (*Morley v. Attenborough*, *supra*.)

Warranty of quality.

Implied warranty of quality.—The following propositions were laid down in the judgment in *Jones v. Jnst.* L. R. 3 Q. B. 202, in which the authorities in support of them will be found:—

Where

1. Where goods are *in esse*, and may be inspected by the buyer, and

Defence.

The defendant denies that he gave any warranty on the sale of the said engine.

there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect is latent and not discoverable on examination, at least where the seller is not the grower or manufacturer. This applies to the sale of meat in a meat-market as to which there is no warranty that it is fit for human food. (*Emerton v. Mathews*, 31 L. J. Ex. 139; 7 H. & N. 586.) It also applies in the case of sale by *sample* if the latter truly represents the bulk. (*Smith v. Hughes*, L. R. 6 Q. B. 597.) It would appear to be different where the goods are consigned under an agreement. Thus, where B., a wholesale provision dealer in London, contracted to send weekly from London by rail to W., a retail tradesman at Brighton, a quantity of Ostend rabbits, the cost of the railway carriage as well as the price of the rabbits being paid by W.: held that there was an implied warranty by B. that the rabbits should be fit for human food, not only when delivered at the railway station in London, but when in the ordinary course of transit they would reach W. at Brighton, and until he should have there a reasonable opportunity of dealing with them in the course of his business. (*Beer v. Walker*, 46 L. J. Q. B. 677.)

goods in
existence
the maxim
*caveat
emptor*
applies.

2. On the sale of a definite existing chattel specifically described, the actual condition of which may be ascertained, there is no implied warranty of quality.

3. Where a known, described, and defined article is ordered of a manufacturer, to whom it is stated to be for a particular purpose, on delivery by him of the article as known, described, and defined, there is no implied warranty by him that it will answer such purpose. (See judgment of majority of Court of Appeal in *Robertson v. The Amazon Tea Co.*, 51 L. J. Ch. 68; 7 Q. B. Div. 598; in accordance with this principle.)

So where a
known and
defined
article is
bought.

4. But where a manufacturer or dealer contracts to supply an article which he manufactures or in which he deals to be applied to a particular purpose, so that the buyer necessarily trusts to his skill or judgment, there is in that case an implied warranty that it is reasonably fit for the purpose to which it is to be applied. This implied warranty is absolute, and extends to latent as well as discoverable defects. (*Randall v. Neeson*, 2 Q. B. Div. 102; 46 L. J. C. P. 259 (C. A.).) The considered judgment of the Court, delivered by Brett, L.J., in which all the cases on the subject are elaborately examined, should be carefully considered in this connection. In the above case, in consequence of the defendant's breach of an implied warranty that the pole of a carriage was fit for the purpose for which it was intended, the carriage was upset and considerable damage done. In granting a new trial the Court of Appeal intimated that the verdict should include such consequential damages as arose naturally from the defect in the pole as well as the value of the pole. (See also *Hyman v. Nye*, 4 Q. B. Div. 685.)

When a
warranty
of quality
will be
implied.

5. Where a manufacturer undertakes to supply goods manufactured by himself or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article.

6. Where the contract is to supply goods of a specified description which the buyer has not had the opportunity of inspecting, the goods must not only answer the description, but must be also merchantable or saleable under that description.

2. Claim for Breach of Warranty on Sale of a Horse.

1. The defendant, on the 10th of March, 1880, sold a horse to the plaintiff for £70, which the plaintiff then paid, and upon such sale the defendant gave the following warranty :—

“The vendor (the defendant) warrants the said horse as quiet to ride and in harness, and free from all vice.”

In *Johnson v. Raylton*, 7 Q. B. Div. 438, the majority of the Court of Appeal (Brett and Cotton, L.JJ., dissenting Bramwell, L.J.) held that on the sale of goods by the manufacturer, who is not otherwise a dealer in them, there is (in the absence of any usage in the particular trade, or, as regards the particular goods, to supply goods of other makers) an implied contract that the goods shall be those of the manufacturer's own make.

Implied warranty in the case of trade marks.

By the 25 & 26 Vict. c. 88 (Merchandise Marks Act. 1862), ss. 19, 20, on the sale or contract to sell (whether in writing or not), any article with any trade-mark on it, or on what it is contained in, or with any description or indication of the number, quality, measure, or weight, or of the place where it was manufactured or produced, there shall be deemed to have been a warranty of the genuineness of the trade-mark, or of the truth of the description, &c., unless the contrary shall have been expressed in writing, signed by or on behalf of the vendor, and delivered to or accepted by the vendee. And by sctt. 22 a right of action is specially given to the person aggrieved by the forging or improper use of trade-marks.

A statement that the purchaser of an article must take it “with all faults,” and that the vendor will give no warranty with it, and will refuse all further claim for compensation (*when the vendor does nothing to conceal any defect*), relieves the vendor from all liability in respect of any defect in the article itself; but if such a statement were followed by a declaration of the vendor (*who knew the reverse*) that he believed the article to be free from objection, that would probably ground an action for deceit. (*Ward v. Hobbs*, 4 App. Cas. 13.)

Damages.—The following decisions will probably be of use to the pleader in setting forth the claim for damages in this action :—

The measure of damage.

If the chattel has been returned and accepted, the plaintiff will be entitled to recover the whole price; if kept, the difference between the real value and the price; and if resold, the difference between what he gave defendant and the price on re-sale. (See *Cuswell v. Coare*, 1 Taunt. 566.) This case related to a warranty of a horse, but the decision applies to other chattels. Where the defendants broke a warranty in not sending hemp that was merchantable, the plaintiff was held entitled to recover the difference between what the hemp was worth when it arrived and what the same hemp would have realised if it had been shipped in a proper state. (*Jones v. Just*, L. R. 3 Q. B. 197.) Where the purchaser of a horse with a warranty re-sold with a warranty, and, the horse proving unsound, was sued on his warranty, and gave the seller, the defendant, the option of defending, but on his failing to do so defended it himself, it was held that he was entitled to recover from him the costs of the action. (*Lewis v. Peake*, 7 Taunt. 153; and see *Rolf v. Crouch*, L. R. 3 Ex. 44; and *Randall v. Newsom*, *supra*.)

In actions on warranties of horses, the plaintiff may in some circumstances include a claim for their keep. If the vendee on discovering the defect, tenders the horse to the vendor, he may recover for keep for

2. The said horse was not at the said time quiet to ride and in harness, and was not free from vice, but was a jibber.

The plaintiff claims £100 damages.

Defence.

1. It was a term of the said warranty that it was only to continue for one month from the sale, and that any horse which did not answer the warranty must be returned to the defendant's repository within the said month.

2. The said horse was not returned to the defendant's repository within the said month.

3. The said horse was at the time of the sale quiet to ride and in harness, and free from all vice.

Reply.

The plaintiff joins issue upon the defence.

3. Claim in Action for Breach of an implied Warranty.

1. In the month of October, 1880, the plaintiff purchased from the defendant for £5 a pole which the plaintiff stated at the time of the said purchase he required for his carriage.

2. The pole which the defendant supplied was not reasonably fit for the said purpose, and in consequence of some defect in it, snapped while in the plaintiff's carriage, and caused serious damage to the said carriage.

such time as would be required to sell him to the best advantage. (*McKenzie v. Hancock*, Ry. & M. 436.) So where after notice that the horse may be taken away by the vendor, he is re-sold by the vendee, the vendor is liable for the cost of keep for a reasonable time. (*Chesterman v. Lamb*, 2 A. & E. 129.) When the vendor rescinds he is liable for the keep from date of contract to rescission. (*King v. Price*, 2 Chitty, 416.)

In an action for breach of warranty that a cow sold by the defendant was free from disease, it was held that the plaintiff could recover for the loss of cattle to which the cow sold communicated the rinderpest. (*Smith v. Green*, 45 L. J. 28.)

Conse-
quential
damages.

A breach of warranty when a *specific chattel* is sold does not entitle the purchaser to rescind the contract and return the chattel, and sue for a return of the price. It only entitles him to bring an action for the breach of warranty. (*Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 C. & M. 207.) If in such a case the purchaser were sued for the price, he could counterclaim for damages for the breach of warranty, and he could also give the breach in evidence in mitigation of the plaintiff's claim.

Particulars of damage :—

1880.	Messrs. Smith's bill for repairs to					
Nov.	carriage	£55	0	0		
	Value of pole	5	0	0		

The plaintiff claims £60 damages.

Defence.

1. The plaintiff did not at the time of the purchase of the said pole state that it was for his carriage, nor did he say what it was for.

2. There was no defect in the said pole, and it was reasonably fit for the said purpose.

3. The injury to the plaintiff's carriage was not caused by any defect in the said pole.

Reply.

The plaintiff joins issue on the statement of defence.

4. Claim for Breach of Warranty with Consequential Damages.

1. The plaintiff has suffered damage by the defendant's breach of a warranty on the sale for £5,000 of a picture called —, made by the defendant to the plaintiff on the 3rd of September, 1879.

2. The warranty was that the picture was a Turner, which it was not.

3. The plaintiff resold the said picture, with a similar warranty, for £5,250, and he has been compelled to pay the purchaser £5,500 damages and costs and has had other costs to pay to his own solicitor.

Particulars of damage :—

1880.	£5,500 damages recovered by A. B. in action of A. B.				
July 1.	against the plaintiff.				
	£270, the costs of the said A. B.				
	£330, costs paid to the plaintiff's solicitor in connection with the said suit.				

The plaintiff claims £7,000 damages.

Defence.

1. The defendant did not warrant that the said picture was a Turner.

2. The plaintiff did not re-sell the said picture with a warrant that it was a Turner.

5. Claim alternatively for Breach of Warranty and Fraudulent Misrepresentation.

1. The plaintiff has sustained damage by a breach of the defendant's warranty given on the 11th of October, 1880, upon the sale to the plaintiff for the sum of £500 of 200 boxes of grapes. The warranty was that the said grapes were English grapes.

2. In the alternative the plaintiff says that at the time of the said sale the defendant represented to the plaintiff that the said grapes were English grapes and not foreign grapes, whereas, in fact, they were foreign grapes, as the defendant well knew.

The plaintiff claims £700 damages.

Defence.

1. The defendant did not give any warranty upon the sale of the said grapes.

2. The defendant did not represent that the said grapes were English and not foreign grapes. He expressly said they were mixed grapes, which he then believed to be the fact.

Reply.

The plaintiff joins issue upon the statement of defence.

6. Claim by party aggrieved against Defendant for Counterfeiting a Trade Mark.

1. On the 21st of June, 1880, the defendant sold to the plaintiff fifty casks of beer, to which was applied the trade mark of Messrs. Bass & Co.

2. The said trade mark was forged or counterfeited by the defendant or by his orders, and applied by him to the said casks.

3. The plaintiff who bought the said beer in reliance upon the genuineness of the said trade mark, and in the belief that the said beer was of the brewing of Messrs. Bass & Co., is a person aggrieved by the act of the defendant.

The plaintiff claims £200 damages.

Watercourse.

See Easement.

Ways.

See Trespass—Easement.

Work and Labour (a).

1. *Claim for Work and Labour on a Builder's Contract.*

The plaintiff's claim is for work done and materials provided by the plaintiff for the defendant at his request.

Contract for work, &c., need not be in writing.

Aliter if not to be performed within a year.

(a) A contract for work and labour or work and materials does not as a rule require to be evidenced by writing. It is not within the Statute of Frauds, unless, indeed, as sometimes happens, it comes within the clause of the 4th section with reference to contracts which are not to be performed within a year. Then, of course, writing is requisite; but only when the contract will *necessarily* continue beyond the year. In *Souch v. Strachridge* (2 C. B. 808), the plaintiff undertook to board a child at the defendant's request at so much a month, "as long as the defendant thought proper," and although this contract in fact continued for more than a year, inasmuch as, at the time it was made, by its terms it would not necessarily continue so long, it was held that writing was not necessary.

In an action for work done, the plaintiff must prove, though he need not aver in his statement of claim, the performance of all conditions precedent on his part; and in the case of building contracts it is generally a condition precedent to the right to payment that the architect should give his certificate as to the amount, &c., of work done; and until the architect gives this certificate no payment can be enforced. Where a contract for the erection of certain works provided that all extras or additions, payment for which the contractor should become entitled to under the said contract, should be paid for at the price fixed by the surveyor appointed by the contractor's employer, it was held that, the surveyor had power to determine what were extras under the con-

In building contracts architect's certificate a condition precedent to payment.

Particulars:—

1882.	To rebuilding house at Wigan			
Jan. 1 to	as per contract dated the			
May 31.	24th Dec., 1881	£3400	0	0
	To extras as per account de-			
	livered	243	0	0
		£3643	0	0
	Paid on account	3000	0	0
	Balance due	£643	0	0

The plaintiff also seeks to recover interest on the above balance from the 31st May, 1882, till payment or judgment.

tract, and therefore that his certificate awarding a certain amount to be due for extras was conclusive. (*Richards v. May*, 10 Q. B. D. 400.) It is no dispensation of the condition that the certificate was withheld by fraud and collusion with the defendant (*Milner v. Field*, 5 Exch. 829), although it is true that on such a state of facts an action of tort for fraud might lie against the architect and defendant, or both. (*Batterbury v. Vyse*, 2 H. & C. 432; L. J. 32 Ex. 177; *Ladbroke v. Barrett*, 46 L. J. 708.) The architect or surveyor need not certify in writing, unless expressly required by the contract to do so. In *Morgan v. Birnie* (9 Bing. 672), a letter from the architect to the plaintiff inclosing the bills with an approval of the charges was held not to be equivalent to a certificate of approval of the work done. And see *Tharxis Sulphur and Copper Co. v. McElroy* (3 App. Cases, 1040).

Building contracts.

In building contracts time is not usually of the essence of the contract. (*Lamprell v. Billericay Union*, 3 Exch. 283.) Where there is a written contract and the plaintiff claims for extras in addition to the charges under the contract, the written contract must be produced, for it is only the written contract which can show what really are extras. (*Vincent v. Cole*, M. & M. 257; *Buxton v. Cornish*, 12 M. & W. 426.) And it has been held that even a distinct promise by the defendant to pay for the work done would not do away with the necessity of producing the contract. (*Vincent v. Cole*, *supra*.)

Where a written contract and also a claim for "extras" the former must be produced.

But where a man is employed to do work under a written contract, and a separate order for other work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced in an action for the second work. (*Reid v. Batte*, M. & M. 413.)

There is no implied warranty in the case of a building contract upon the part of the employer that the work can be done in the mode prescribed by the plans and specifications. (*Thorn v. Mayor and Corporation of London*, 1 App. Cas. 120; 45 L. J. Exch. 62.)

A building contract contained a proviso that in case the contract should not be in all respects performed by the contractor he should pay £1,000 as liquidated damages. It was held that this was a penalty, and not liquidated damages. (*Re Newman*, 4 Ch. D. 724; 46 L. J. Bank. 57.)

If the defendant has received no benefit from the work on account of the improper and unskilful way in which the plaintiff did it, the latter

Defence.

The defendant says that :—

1. Except as to £200 parcel of the money claimed, the architect did not grant his certificate pursuant to the contract.
2. As to £200 parcel of the money claimed, the defendant brings [*or has brought*] into Court £200, and says that sum is enough to satisfy the plaintiff's claim herein pleaded to.

Counter-claim.

The defendant says that :—

1. The contract contained a clause whereby it was provided that the plaintiff should complete the works by the 31st March, 1882, or in default pay to the defendant £1 a day for every subsequent day during which the works should remain unfinished, and they so remained unfinished for 61 days to the 31st May.

The defendant counter-claims £61.

Reply.

The plaintiff says that :—

1. As to the 1st paragraph of the defence, he joins issue.
2. As to the 2nd paragraph thereof the plaintiff accepts the £—— in part satisfaction.

The plaintiff as to the counter-claim says that :—

3. The liquidated damages were waived by ordering extras and material alterations in the work.

Where
thing being
made is
destroyed
before com-
pletion,
who bears
the loss—
employer or
workman.

cannot recover anything for his labour. (*Furnworth v. Garrard*, 1 Camp. 38; *Denew v. Dacrell*, 3 Camp. 451.) Questions sometimes arise whether, where a particular thing is destroyed or injured while being made to the order of another, the workman or the person for whom the thing is being made will have to bear the loss; and on this point the following distinction exists :—If the contract is entire for the performance of a specific work for a specified sum, so that the performance of the whole of the work bargained for and agreed to be done is a condition precedent to the right of payment for any part of it, the workman will be deprived of all legal right to remuneration if the work is destroyed by accident before it has been completed (*Appleby v. Myers*, L. R. 3 Q. B. 651; 36 L. J. C. P. 331); but if the workman is entitled to payment from time to time as the work proceeds, the destruction of the work before its completion will not deprive the workman of his hire. (*Met-
t. ne v. Athaves*, 3 Burr. 1592; *Tripp v. Armitage*, 4 M. & W. 690.)

2. Claim on a Building Contract, and for Extras.

1. The plaintiff claims the contract price of £250 in respect of the painting and decorating of the defendant's house, No. 13, Royal Crescent, Brighton, done by him under a contract of the 5th of May, 1880.

2. The plaintiff also claims £81 for extra work of the same description done upon the said premises by the plaintiff at the defendant's request.

Particulars of the said extra works, exceeding in length three folios, are delivered herewith.

The plaintiff claims £250 and £81.

Defence.

1. It was a term of the said contract of the 5th of May, 1880, that the plaintiff should not be entitled to any money under it in respect of work done until such work had been approved by A. B. the architect, and his certificate in writing given.

2. The work in respect of which the plaintiff sues in this action has never been approved by the said A. B., nor has he given his certificate in writing.

3. The defendant did not order any of the extras claimed for.

4. It was also a term of the said contract that the plaintiff should not be entitled to recover for any extra work unless the same were ordered in writing by the said A. B.

5. A. B. did not order any of the said extra works in writing.

3. Claim by a Commercial Traveller for his Salary and Commissions.

1. On the 3rd of November, 1880, the plaintiff entered the defendant's employment as a commercial traveller at a salary of £150 a year, payable half-yearly, and a commission of 2½ per cent. upon all orders he obtained.

2. From the said date to the 3rd of May, 1881, the plaintiff obtained orders to the value of £5000.

The plaintiff claims:—

- (1) £75, half-a-year's salary; and
- (2) £125 for commissions.

Defence.

1. The defendant employed the plaintiff at a salary of £150 a year, payable half-yearly, and a commission of 2½ per cent. upon the nett profit realised upon all orders he obtained.
2. The nett profit realised upon the said orders was £1000.
3. Before action brought the defendant paid to the plaintiff the sum of £50 on account of his salary and commissions.
4. The defendant brings into Court the sum of £50, and says it is sufficient to satisfy the plaintiff's claim herein.

Reply.

The plaintiff joins issue upon the defence.

4. Claim against Defendants in the Alternative for Literary Services.

1. By an agreement made on the 5th of April, 1880, between the plaintiff and the defendant N., who was duly authorised by the defendant P. to act as his agent in that behalf, it was agreed that the plaintiff should be employed by the defendant P., at a salary of £—— a month, to assist the defendant P. by his literary labour in the advocacy of the views of the U. K. A. Society.

2. Thenceforth until the month of December, 1881, the plaintiff was employed by the defendant P. in a variety of ways in advocating the objects of the said association, and there accrued due to the plaintiff under the said agreement the sum of £——.

3. In the alternative, the plaintiff says that the defendant N. warranted that he was authorised by the defendant P. to engage the plaintiff upon the terms already stated, whereas in fact he had no such authority, and the plaintiff in consequence is unable to obtain any remuneration for his said work and services.

The plaintiff claims:—

- (1) £210 from the defendant P.; or
- (2) The sum of £210 from the defendant N. by way of damages.

5. *Claim by an Author against Publishers.*

1. On the 30th of July, 1880, it was agreed by and between the plaintiff and the defendants that the plaintiff should write for the defendants a work of fiction, to be published by them in monthly shilling parts, and that the plaintiff should receive, as remuneration for his literary labour, the sum of £150, to be paid upon the publication of the last of the said monthly parts.

2. The last of the said monthly parts was published before action brought.

The plaintiff claims £150.

Wrongful Dismissal (a).

1. *Claim by a Clerk for Wrongful Dismissal.*

1. The plaintiff was engaged by the defendant on the 1st of January, 1880, as a clerk in his warehouse, at a salary of £100

(a) An indefinite hiring in the case of servants (other than menial servants), without mention of time, is presumed as a matter of fact which may be rebutted by other circumstances to be a hiring for one year, and the fact of the wages being payable monthly does not necessarily make any difference. In every case, however, the terms of the hiring are for the jury, who must take the usages of the particular trade into consideration. In the case of a hiring "at two guineas a week for one year," *Bramwell, B.*, told the jury they might find a weekly hiring. (*Robertson v. Jenner*, 15 L. T. N. S. 514.) So a hiring "at £2 a week and a house" has been held to be a weekly hiring. (*Evans v. Roe*, L. R. 7 C. P. 138.)

An indefinite hiring presumed to be for a year.

If during the year, where the service is yearly, the servant is dismissed without cause, he is entitled as damages to his wages to the end of the year. But if the servant leave the service without cause or is discharged by the master or by a magistrate's order for good cause during the year, he cannot recover any of the current wages. (See *Smith's Master and Servant*, 3rd ed., p. 178.)

With regard to menial or domestic servants it is generally understood (except where a different custom is proved to prevail) that though the contract is for a year, it may be dissolved by either party on giving a

Menial servants may be

a year, and upon the terms that he should receive six months' notice or six months' salary in lieu of notice.

2. On the 3rd of February, 1880, the defendant dismissed the plaintiff without any notice, or wages in lieu of notice.

The plaintiff claims £50.

discharged with a month's warning.

Who are menial servants.

A custom to discharge on notice may be engrafted on a general hiring.

Hiring for twelve-months.

Master not bound to

month's warning, or on the part of the employer by giving a month's wages. (*Beaton v. Collyer*, 4 Bing. 313; *Fawcett v. Cash*, 5 B. & Ad. 908.) A governess has been held not to be a menial servant within the meaning of this rule. (*Todd v. Kerrick*, 8 Ex. 151; 22 L. J. Ex. 1); but a head gardener and huntsman have been held to be such servants. (*Nicol v. Greaves*, 33 L. J. C. P. 259; 17 C. B. N. S. 27; *Johanson v. Blenkinsop*, 5 Jurist. 870; *Noulan v. Ablet*, 2 C. M. & R. 54.) The notice may be given at any time, i.e., need not be given at the end of any month from the commencement of the service. In such cases, if the master without reasonable cause dismisses the servant without notice, the latter is entitled to recover a month's wages beyond the arrears (if any). (*Robinson v. Hindman*, 3 Esp. 235.)

A general engagement of an agent at a specified sum per annum simply, is a hiring for a year; but a custom to discharge on notice may be engrafted on such hiring if the terms be not inconsistent with the custom. A stipulation for a gratuity at the end of the year has been held to be not inconsistent with such custom. (*Metzner v. Parker*, 9 Ex. 518; 23 L. J. Ex. 130; *Parker v. Ibbetson*, 27 L. J. C. P. 236; 4 C. B. N. S. 346.) It is a question for the judge whether a written contract excludes such a custom. (*Parker v. Ibbetson*, *supra*.) But when the hiring is expressly for a certain fixed time a custom to determine it before without notice is inadmissible. (*Peters v. Naveley*, 15 L. T. N. S. 275.) Clerks in London are said to be entitled to three months' notice. (Per Pollock, C.B., who stated in *Fairman v. Oakford*, 29 L. J. Ex. 459—60, that juries in London generally find to that effect.) In *Hiscoe v. Batchelor*, 15 L. T. N. S. 543, the jury found that an advertising and canvassing agent was only entitled to one month's notice.

A contract of hiring "for one whole year, and so on from year to year as the parties should respectively please," can only be determined at the end of any current year and upon reasonable notice. (*Williams v. Byrne*, 7 Ad. & E. 177.) An agreement for "twelve months certain, after which time either party should be at liberty to terminate the agreement," by three months' notice, may be determined by three months' notice terminating after the end of the twelve months. (*Langton v. Carleton*, L. R. 9 Ex. 57, Kelly, C.B., *dissentiente*.) The master of a ship was hired under a contract providing that "should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up command." In an action by the captain for wrongful dismissal without notice, but not for misconduct, it was held that he was entitled to reasonable notice. (*Green v. Wright*, 1 C. P. Div. 591.)

As to agreements for service for over twelve months, see 4th section of the Statute of Frauds, which requires them to be evidenced by writing.

A dismissed servant or agent will not necessarily be entitled to his full salary or wages for the unexpired term of the contract, as it is liable to be reduced by the probabilities of his having other employment during such period. (*Hartland v. General Exchange Bank*, 14 L. T. N. S. 383; *Hochester v. De la Tour*, 22 L. J. Q. B. 458; 2 E. & B. 690; and see *Yelland's case*, L. R. 4 Eq. 350; *Ex parte Clarke*, L. R. 7 Eq. 550; and *Ex parte Logan*, L. R. 9 Eq. 149.)

The master is not bound to enquire the reason for dismissal at the time thereof, and where a good cause for dismissal in fact existed at such

Defence.

1. By the said agreement the defendant was only entitled to one month's notice.

2. The defendant, on the 3rd of January, 1880, gave the plaintiff one month's notice to leave his said service.

Reply.

The plaintiff joins issue upon the statement of defence.

2. Claim by a Domestic Servant for Arrears of Wages and Wrongful Dismissal.

1. The plaintiff has suffered damage by the defendant wrongfully dismissing him from his situation of a cook without one month's notice, or one month's salary in lieu of notice, viz., £15.

2. At the time of his dismissal the defendant owed the plaintiff the sum of £20 for six weeks' wages then in arrear.

time, it is immaterial whether or not it was the real cause. (*Ridgway v. Hungerford Market Co.*, 3 A. & E. 171.)

Where the payment of wages was to be at the rate of £50 per month, it was held that subsequent misconduct was no answer to an action for wages which had accrued due at the time of dismissal, because there was a vested right to each month's wages when the month had elapsed. (*Button v. Thomson*, L. R. 4 C. P. 330; *Taylor v. Laird*, 1 H. & N. 266; 25 L. J. Ex. 329.) This may be altered by the terms of hiring.

Defence—Dismissal for misconduct, disobedience, &c.—If a servant misconducts himself, the master may dismiss him without notice. A refusal to obey a lawful order is a good ground for dismissal. (*Lilley v. Elwin*, 11 Q. B. 742.) A wrongful claim by a clerk that he is a partner, entitles the employer to dismiss him instantly. (*Amor v. Fearon*, 9 Ad. & E. 548.) If a traveller sells his employer's wines to a brothel keeper he may be dismissed without notice. (*Blenkarn v. Hodges' Distillery Co.*, 16 L. T. N. S. 608.) So where a servant embezzles his master's money, even though wages exceeding amount embezzled are due to him. (*Brown v. Croft*, 1 Chitty's Prac. of the Law, 82.)

Where a master having a right to discharge his servant for misconduct condones it, and retains the servant, he cannot afterwards discharge him for the same misconduct. (*Phillips v. Foxall*, L. R. 7 Q. B. 680.)

In contracts for personal service it is an implied condition that the death of either party shall dissolve the contract. Therefore, when A. was hired by P. at a working wage, and it was agreed that the service was to be determined by six months' notice and six months' wages, it was held on the death of P. that his personal representatives were not bound to continue A. in their service or pay six months' wages. (*Farrow v. Wilson*, L. R. 4 C. P. 744.)

assign any reason for dismissal.

Misconduct no answer to claim for wages which are due at the time.

Misconduct for which a master may instantly discharge his servant.

The plaintiff claims :—

- (1) The said sum, £20 ;
- (2) £15 damages for the said wrongful dismissal.

Defence.

1. The defendant did not owe the plaintiff the sum of £20, or any other sum in respect of arrears of wages at the time of his dismissal.

2. Before the said dismissal the plaintiff had been guilty of gross misconduct, and had behaved himself in an obscene and indecent manner towards certain female servants in the defendant's household. When the plaintiff was questioned as to his said misconduct, he admitted that he had done the acts complained of, and declared that he would repeat them on the first opportunity, and was guilty of great impertinence towards the defendant, whereupon the defendant dismissed him, which is the grievance complained of.

3. Claim for Wrongful Dismissal and Libel and Slander.

1. The plaintiff has sustained damage by the defendant wrongfully dismissing him from his employment as a shopman, and failing to give him three months' notice of dismissal in accordance with the terms of an agreement of the 2nd of July, 1880, whereby he was engaged at a salary of £100 a year.

2. After the said wrongful dismissal the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say, "Henry Jones" (meaning the plaintiff) "was the worst and most unsatisfactory servant I ever had. I had to be always watching him, or he would be at the till. He did rob me of a fiver, and I dismissed him for it," meaning that the plaintiff had committed an indictable offence.

3. The defendant also falsely and maliciously wrote and published of and concerning the plaintiff the words following, that is to say, "Henry Jones" (meaning the plaintiff) "was in my service for two months, and I dismissed him for dishonesty."

4. By reason of the publication of the said words Mr. A. B., of C., refused to engage the plaintiff as his shopman, and he is unable to obtain any employment.

The plaintiff claims :—

- (1) £25 for the said wrongful dismissal; and
- (2) £500 damages for the libel and slander complained of.

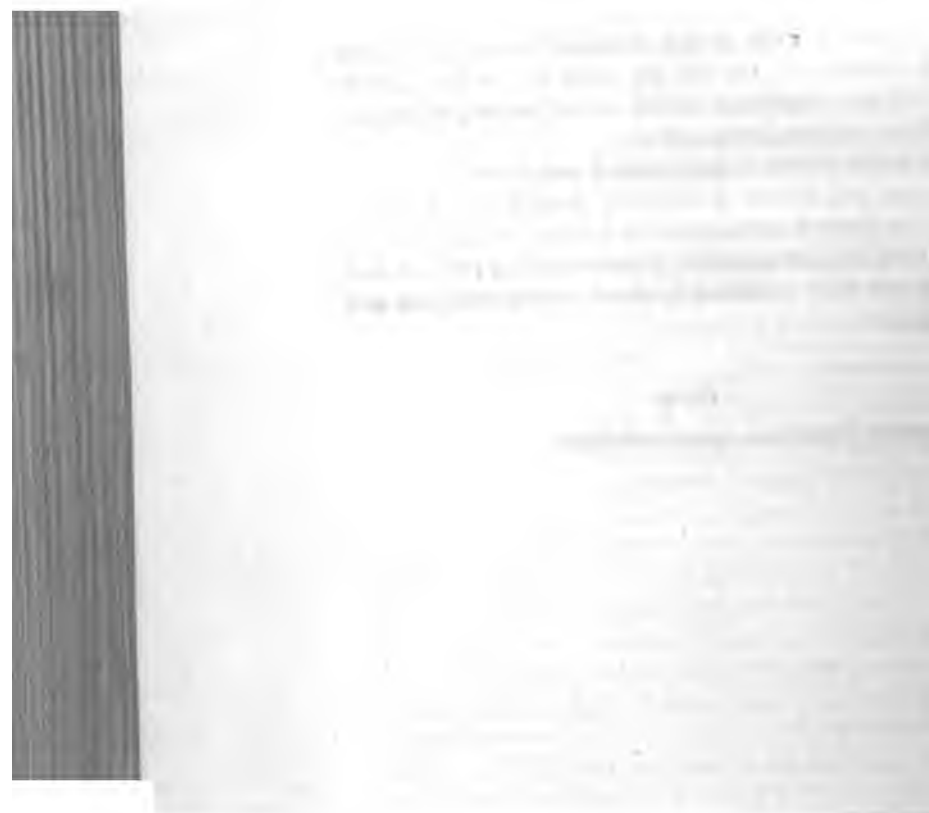
Defence.

1. The plaintiff while in the defendant's employment was guilty of dishonesty. On the day when he was dismissed he stole £5 of the defendant's money out of the till, whereupon the defendant at once discharged him.

2. The words set out in paragraphs 2 and 3 were spoken in the one case and written in the other to one Mr. A. B., of C., to whom the plaintiff had applied for a situation, and who had inquired from the defendant the character of the plaintiff, and the said words were published by the defendant *bonâ fide* and without malice.

Reply.

The plaintiff joins issue upon the defence.



APPENDIX.

ORDER III.

INDORSEMENTS OF CLAIM.

1. The indorsement of claim shall be made on every writ of summons before it is issued.

2. In the indorsement required by Order II., Rule 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled.

3. The indorsement of claim shall be to the effect of such of the forms in Appendix (A), Part III., as shall be applicable to the case, or, if none be found applicable, then such other similarly concise form as the nature of the case may require.

4. If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, the indorsement shall show in manner appearing by such of the forms in Appendix (A), Part III., sec. VII., as shall be applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

5. In probate actions the indorsement shall show whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next-of-kin, heir-at-law, devisee, or in any and what other character.

6. In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A.) upon a contract, express or implied, (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or (B.) on a bond or contract under seal for payment of a liquidated amount of money; or (C.) on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt other than a penalty; or (D.) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (E.) on a trust; or (F.) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant; the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of such of the forms in Appendix (C), sec., IV., as shall be applicable to the case.

7. Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, besides stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state, that upon payment thereof within

four days after service, or in case of a writ not for service within the jurisdiction within the time allowed for appearance, further proceedings will be stayed. Such statement shall be in the form in Appendix (A), Part III., sec. III. The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation.

8. In all cases in which the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken.

ORDER XVI.

PARTIES.

I. Generally.

1. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge in disposing of the costs shall otherwise direct.

2. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a *bond fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

3. Where in an action any person has been improperly or unnecessarily joined as a co-plaintiff, and a defendant has set up a counter-claim or set-off, he may obtain the benefit thereof by establishing his set-off or counter-claim as against the parties other than the co-plaintiff so joined, notwithstanding the misjoinder of such plaintiff or any proceeding consequent thereon.

4. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

5. It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

6. The plaintiff may, at his option, join as parties to the same action all, or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes.

7. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants

to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties.

8. Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a judge may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties.

9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested.

10. Subject to the provisions of the Acts and these rules, in all Probate actions the rules as to parties, in use in the Court of Probate previously to the commencement of the Principal Act, shall continue to be in force.

11. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party, shall be deemed to have begun only on the service of such writ or notice.

12. Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.

13. Where a defendant is added or substituted, the plaintiff shall, unless otherwise ordered by the Court or a judge, file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served.

II.—Partners.

14. Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct. Provided that, in the case of a co-partnership which has been dissolved, to the knowledge of the plaintiff, before the commencement of the action, the writ of summons shall be served upon every person sought to be made liable.

15. Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm.

III.—Persons under Disability.

16. Infants may sue as plaintiffs by their next friends, in the manner heretofore practised in the Chancery Division, and may, in like manner, defend by their guardians appointed for that purpose. Married women may sue and be sued as provided by the Married Women's Property Act, 1882.

17. Where lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the Principal Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose.

18. An infant shall not enter an appearance except by his guardian *ad litem*. No order for the appointment of such guardian shall be necessary, but the solicitor applying to enter such appearance, shall make and file an affidavit in the Form No. 8 in Appendix A., Part II., with such variations as circumstances may require.

19. Every infant served with a petition or notice of motion, or summons in a matter, shall appear on the hearing thereof by a guardian *ad litem* in all cases in which the appointment of a special guardian is not provided for. No order for the appointment of such guardian shall be necessary, but the solicitor by whom he appears shall previously make and file an affidavit as in the last rule mentioned.

20. Before the name of any person shall be used in any action as next friend of any infant, or other party, or as relator, such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the Central Office, or in the District Registry, if the cause or matter is proceeding therein.

21. In all causes or matters to which any infant or person of unsound mind, whether so found by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence or as to any other procedure shall, if given with the consent of the Court or a judge by the next friend, guardian, committee, or other person acting on behalf of the person under disability, have the same force and effect as if such party were under no disability and had given such consent. Provided that no such consent by any committee of a lunatic shall be valid as between him and the lunatic unless given with the sanction of the Lord Chancellor or Lords Justices sitting in Lunacy.

IV.—Proceedings by or against Paupers.

22. Any person may be admitted in the manner heretofore accustomed to sue or defend as a pauper on proof that he is not worth £25. his wearing apparel and the subject-matter of the cause or matter only excepted.

23. A person desirous of suing as a pauper shall lay a case before counsel for his opinion whether or not he has reasonable grounds for proceeding.

24. No person shall be permitted to sue as a pauper unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party, or his solicitor, that the case contains a full and true statement of all the material facts to the best of his knowledge and belief, shall be produced before the Court or Judge or proper officer to

whom the application is made, and no fee shall be payable by a pauper to his counsel or solicitor.

25. A person admitted to sue or defend as a pauper shall not be liable to any court fee.

26. Where a person is admitted to sue or defend as a pauper the Court or a judge may, if necessary, assign a counsel or solicitor, or both, to assist him, and a counsel or solicitor so assigned shall not be at liberty to refuse his assistance unless he satisfies the Court or judge that he has some good reason for refusing.

27. Whilst a person sues or defends as a pauper no person shall take, or agree to take, or seek to obtain from him any fee, profit, or reward, for the conduct of his business in the Court, and any person who takes, or agrees to take, or seeks to obtain any such fee, profit, or reward shall be guilty of a contempt of Court.

28. If any person admitted to sue or defend as a pauper gives, or agrees to give, any such fee, profit, or reward, he shall be forthwith dispaupered, and shall not be afterwards admitted again in the same cause to sue or defend as a pauper.

29. No notice of motion shall be served or summons issued, and no petition shall be presented, on behalf of any person admitted to sue or defend as a pauper, except for the discharge of his solicitor, unless it is signed by his solicitor.

30. It shall be the duty of the solicitor assigned to a person admitted to sue or defend as a pauper to take care that no notice is served, or summons issued, or petition presented, without good cause.

31. Costs ordered to be paid to a person admitted to sue or defend as a pauper shall, unless the Court or a judge shall otherwise direct, be taxed as in other cases.

V.—Administration and Execution of Trusts.

32. In any case in which the right of an heir-at-law or the next-of-kin or a class shall depend upon the construction which the Court or a judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law or next-of-kin or class, and the Court or judge shall consider that in order to save expense or for some other reason it will be convenient to have the questions of construction determined before such heir-at-law, next of kin, or class shall have been ascertained by means of inquiry or otherwise, the Court or judge may appoint some one or more persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court or judge in the presence of such persons shall be binding upon the heir-at-law, next of kin, or class so represented.

33. Any residuary legatee or next of kin entitled to a judgment or order for the administration of the personal estate of a deceased person, may have the same without serving the remaining residuary legatees or next of kin.

34. Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, and who may be entitled to a judgment or order for the administration of the estate of a deceased person, may have the same without serving any other legatee or person interested in the proceeds of the estate.

35. Any residuary devisee or heir entitled to the like judgment or order, may have the same without serving any co-residuary devisee or co-heir.

36. Any one of several *cestui que trust* under any deed or instrument entitled to a judgment or order for the execution of the trusts of the deed or instrument, may have the same without serving any other *cestui que trust*.

37. In all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest.

38. Any executor, administrator, or trustee entitled thereto may have a judgment or order against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or the execution of the trusts.

39. The Court or a judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

40. Wherever, in any action for the administration of the estate of a deceased person or the execution of the trusts of any deed or instrument, or for the partition or sale of any hereditaments, a judgment or an order has been pronounced or made :—

(a.) Under Order XV.;

(b.) Under Order XXXIII.;

(c.) Affecting the rights or interests of persons not parties to the action;

the Court or a judge may direct that any persons interested in the estate or under the trust or in the hereditaments, shall be served with notice of the judgment or order; and after such notice such persons shall be bound by the proceedings, in the same manner as if they had originally been made parties, and shall be at liberty to attend the proceedings under the judgment or order. Any person so served may, within one month after such service, apply to the Court or judge to discharge, vary, or add to the judgment or order.

41. It shall not be necessary for any person served with notice of any judgment or order, to obtain an order for liberty to attend the proceedings under such judgment or order, but such person shall be at liberty to attend the proceedings upon entering an appearance in the Central Office in the same manner, and subject to the same provisions, as a defendant entering an appearance.

42. A memorandum of the service upon any person of notice of the judgment or order in any action under Rule 40 shall be entered in the Central Office upon due proof by affidavit of such service.

43. Notice of a judgment or order served pursuant to rule 40 shall be entitled in the action and there shall be endorsed thereon a memorandum in the form No. 28 in Appendix G.

44. Notice of a judgment or order on an infant or person of unsound mind not so found by inquisition shall be served in the same manner as a writ of summons in an action.

45. In any cause or matter to execute the trusts of a will it shall not be necessary to make the heir-at-law a party, but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

46. If in any cause, matter, or other proceeding it shall appear to the Court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding on such notice to such persons, if any, as the Court or judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding.

47. In any cause or matter for the administration of the estate of a

deceased person, no party other than the executor or administrator shall, unless by leave of the Court or a judge, be entitled to appear either in Court or in chambers on the claim of any person not a party to the cause or matter against the estate of the deceased person in respect of any debt or liability. The Court or a judge may direct or give liberty to any other party to the cause or matter to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as they or he shall think fit.

VI.—*Third-Party Procedure.*

48. Where a defendant claims to be entitled to contribution, or indemnity over against any person not a party to the action, he may, by leave of the Court or a judge, issue a notice (hereinafter called the third-party notice) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a judge, be served within the time limited for delivering his defence. Such notice may be in the form or to the effect of the Form No. 1 in Appendix B, with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action.

49. If a person not a party to the action, who is served as mentioned in Rule 48 (hereinafter called the third party), desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the action within eight days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice. Provided always, that a person so served and failing to appear within the said period of eight days may apply to the Court or a judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or judge shall think fit.

50. Where a third party makes default in entering an appearance in the action, in case the defendant giving the notice suffer judgment by default, he shall be entitled at any time, after satisfaction of the judgment against himself, or before such satisfaction by leave of the Court or a judge, to enter judgment against the third party to the extent of the contribution or indemnity claimed in the third-party notice: provided that it shall be lawful for the Court or a judge to set aside or vary such judgment upon such terms as may seem just.

51. Where a third party makes default in entering an appearance in the action, in case the action is tried and results in favour of the plaintiff, the judge who tries the action may, at or after the trial, enter such judgment as the nature of the case may require for the defendant giving the notice against the third party: provided that execution thereon be not issued without leave of the judge until after satisfaction by such defendant of the verdict or judgment against him. And if the action is finally decided in the plaintiff's favour, otherwise than by trial, the Court or a judge may, on application by motion or summons, as the case may be, order such judgment as the nature of the case may require to be entered for the defendant giving the notice against the third party at any time after satisfaction by the defendant of the amount recovered by the plaintiff against him.

52. If a third party appears pursuant to the third-party notice, the

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defendant giving the notice may apply to the Court or a judge for directions, and the Court or judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or judge may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.

53. The Court or a judge upon the hearing of the application mentioned in Rule 52, may, if it shall appear desirable to do so, give the third party liberty to defend the action, upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the Court or judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action.

54. The Court or a judge may decide all questions of costs, as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other, or others, or give such direction as to costs as the justice of the case may require.

55. Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action.

ORDER XVII.

CHANGE OF PARTIES BY DEATH, &c.

1. A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*; and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death.

2. In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party, or be served with notice in such manner and form as hereinafter prescribed, and on such terms as the Court or judge shall think just, and shall make such order for the disposal of the cause or matter as may be just.

3. In case of an assignment, creation, or devolution of any estate or

title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved.

4. Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.

5. An order obtained as in the last preceding Rule mentioned shall, unless the Court or judge shall otherwise direct, be served upon the continuing party or parties, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following Rules, be binding on the persons served therewith, and every person served therewith who is not already a party to the cause or matter shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons.

6. Where any person who is under no disability or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the cause or matter, shall be served with such order as in Rule 4 mentioned, such person may apply to the Court or a judge to discharge or vary such order at any time within twelve days from the service thereof.

7. Where any person being under any disability other than coverture, and not having a guardian *ad litem* in the cause or matter, is served with any order as in Rule 4 mentioned, such person may apply to the Court or a judge to discharge or vary such order at any time within twelve days from the appointment of a guardian *ad litem* for such party, and until each period of twelve days shall have expired, such order shall have no force or effect as against such last-mentioned person.

8. When the plaintiff or defendant in a cause or matter dies, and the cause of action survives, but the person entitled to proceed fails to proceed, the defendant (or the person against whom the cause or matter may be continued) may apply by summons to compel the plaintiff (or the person entitled to proceed) to proceed within such time as may be ordered: and in default of such proceeding, judgment may be entered for the defendant, or, as the case may be, for the person against whom the cause or matter might have been continued; and in such case, if the plaintiff has died, execution may issue as in the case provided for by Order XLII., Rule 23.

9. Where any cause or matter becomes abated, or in the case of any such change of interest as is by this Order provided for, the solicitor for the plaintiff or person having the conduct of the cause or matter, as the case may be, shall certify the fact to the proper officer, who shall cause an entry thereof to be made in the cause-book opposite to the name of such cause or matter.

10. Where any cause or matter shall have been standing for one year in the cause-book marked as "abated," or standing over generally, such cause or matter at the expiration of the year shall be struck out of the cause-book.

ORDER XVIII.

JOINDER OF CAUSES OF ACTION.

1. Subject to the following Rules of this Order, the plaintiff may unite in the same action several causes of action, but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

2. No cause of action shall unless by leave of the Court or a judge be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held or for any wrong or injury to the premises claimed.

3. Claims by a trustee in bankruptcy as such shall not, unless by leave of the Court or a judge, be joined with any claim by him in any other capacity.

4. Claims by or against husband and wife may be joined with claims by or against either of them separately.

5. Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

6. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant.

7. The last three preceding Rules shall be subject to Rules 1, 8, and 9 of this Order.

8. Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the Court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of together.

9. If, on the hearing of such application as in the last preceding Rule mentioned, it shall appear to the Court or a judge that the causes of action are such as cannot all be conveniently disposed of together, the Court or judge may order any of such causes of action to be excluded, and consequential amendments to be made, and may make such order as to costs as may be just.

ORDER XIX.

PLEADING GENERALLY.

1. The following rules of pleading shall be used in the High Court of Justice.

2. The plaintiff shall, subject to the provisions of Order XX., and at such time and in such manner as therein prescribed, deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled. The defendant shall, subject to the provisions

of Order XXI., and at such time and in such manner as therein prescribed, deliver to the plaintiff his defence, set-off, or counter-claim (if any), and the plaintiff shall, subject to the provisions of Order XXIII., and at such time and in such manner as therein prescribed, deliver his reply (if any) to such defence, set-off, or counter-claim. Such statements shall be as brief as the nature of the case will admit, and the taxing officer in adjusting the costs of the action shall at the instance of any party, or may without any request, inquire into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

3. A defendant in an action may set-off, or set-up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

4. Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary; but where pleadings have been settled by counsel or a special pleader they shall be signed by him; and if not so settled they shall be signed by the solicitor, or by the party if he sues or defends in person.

5. The forms in Appendices C., D., and E., when applicable, and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings, and where such forms are applicable and sufficient any longer forms shall be deemed prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same, as the case may be.

6. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading; provided that, if the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading.

7. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

8. The party at whose instance particulars have been delivered under a judge's order shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons. Save as in this Rule provided, an order for particulars shall not unless the order otherwise provides, operate as a stay of proceedings, or give any extension of time.

9. Every pleading which shall contain less than ten folios (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading, not being a petition or summons, shall be printed.

10. Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to

the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer.

11. Every pleading shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, the reference to the letter and number of the action, the Division to which the judge (if any) to whom the action is assigned belongs, the title of the action, and the description of the pleading, and shall be indorsed with the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor.

12. Nothing in these Rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead, he shall not plead any other defence to the same cause of action without the leave of the Court or a judge.

13. Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

14. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

15. The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds.

16. No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

17. It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

18. Subject to the last preceding Rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading (if any) subsequent to reply may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of facts in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.

19. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or

any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances.

20. When a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise.

21. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material.

22. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

23. Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material.

24. Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

25. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied: (*e.g.*, consideration for a bill of exchange, where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim).

26. No technical objection shall be raised to any pleading on the ground of any alleged want of form.

27. The Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client.

28. In actions in any division for damage by collision between vessels, unless the Court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action and the solicitor for the defendant shall within seven days after appearance, and before any pleading is delivered, file with the Registrar, Master, or other proper officer, as the case may be, a document to be called a Preliminary Act, which shall be sealed up and shall not be opened until ordered by the Court or a judge, and which shall contain a statement of the following particulars:

- (a.) The names of the vessels which came into collision and the names of their masters;
- (b.) The time of the collision;
- (c.) The place of the collision;
- (d.) The direction and force of the wind;
- (e.) The state of the weather;

- (f.) The state and force of the tide ;
- (g.) The course and speed of the vessel when the other was first seen ;
- (h.) The lights, if any, carried by her ;
- (i.) The distance and bearing of the other vessel when first seen ;
- (k.) The lights, if any, of the other vessel which were first seen ;
- (l.) Whether any lights of the other vessel, other than those first seen, came into view before the collision ;
- (m.) What measures were taken, and when, to avoid the collision ;
- (n.) The parts of each vessel which first came into contact.

The Court or a judge may order the Preliminary Act to be opened and the evidence to be taken thereon without its being necessary to deliver any pleadings ; but in such case, if either party intends to rely on the defence of compulsory pilotage, he may do so, and shall give notice thereof in writing to the other party, within two days from the opening of the Preliminary Act.

ORDER XX.

STATEMENT OF CLAIM.

1. The delivery of statements of claim shall be regulated as follows :—

- (a.) Where the writ is specially indorsed under Order III., Rule 6, no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim :
- (b.) Subject to the provisions of Order XIII., Rule 12, as to filing a statement of claim when there is no appearance, no statement of claim need be delivered unless the defendant at the time of entering appearance, or within eight days thereafter, gives notice in writing to the plaintiff or his solicitor that he requires a statement of claim to be delivered :
- (c.) If no statement of claim has been delivered and the defendant gives notice requiring the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver it within five weeks from the time of the plaintiff receiving such notice :
- (d.) The plaintiff may (except as in (a) mentioned) deliver a statement of claim, either with the writ of summons or notice in lieu of writ of summons, or at any time afterwards either before or after appearance, notwithstanding that the defendant may have appeared and not required the delivery of a statement of claim : Provided that in no case where a defendant has appeared shall a statement be delivered more than six weeks after the appearance has been entered unless otherwise ordered by the Court or a judge :
- (e.) Where the plaintiff delivers a statement of claim without being required to do so, or the defendant unnecessarily requires such statement, the Court or a judge may make such order as to the costs occasioned thereby as shall be just, if it appears that the delivery of a statement of claim was unnecessary or improper.

2. In Probate actions the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited

for his appearance, in case he has made default; but where the defendant has appeared the plaintiff shall not be compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit as to scripts.

3. In Admiralty actions *in rem* the plaintiff shall, within twelve days from the appearance of the defendant, deliver his statement of claim.

4. Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ.

5. The statement of claim must, in all cases in which it is proposed that the trial should be elsewhere than in Middlesex, show the proposed place of trial.

6. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief, which may always be given, as the Court or a judge may think just, to the same extent as if it had been asked for. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his defence.

7. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts.

8. In every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same shall not be alleged in the pleadings.

9. In probate actions where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest.

ORDER XXI.

DEFENCE AND COUNTER-CLAIM.

1. In actions for a debt or liquidated demand in money comprised in Order III., Rule 6, a mere denial of the debt shall be inadmissible.

2. In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact; *e.g.*, the drawing, making, endorsing, accepting, presenting, or notice of dishonour of the bill or note.

3. In actions comprised in Order III., Rule 6, classes (A.) and (B.), a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed; *e.g.*, in actions for goods bargained and sold or sold and delivered, the defence must deny the order or contract, the delivery, or the amount claimed; in an action for money had and received, it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff.

4. No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted.

5. If either party wishes to deny the right of any other party to claim as executor, or as trustee whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically.

6. Where a statement of claim is delivered to a defendant he shall deliver his defence within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a judge.

7. A defendant who has appeared in an action, and who has neither received nor required the delivery of a statement of claim, must deliver his defence (if any) at any time within ten days after his appearance, unless such time is extended by the Court or a judge.

8. Where leave has been given to a defendant to defend under Order XIV, he shall deliver his defence (if any) within such time as shall be limited by the order giving him leave to defend, or if no time is thereby limited, then within eight days after the order.

9. Where the Court or a judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.

10. Where any defendant seeks to rely upon any grounds as supporting a right of counter-claim, he shall, in his statement of defence, state specifically that he does so by way of counter-claim.

11. Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

12. Where any such person as in the last preceding Rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 2 in Appendix (B), or to the like effect.

13. Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.

14. Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

15. Where a defendant sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply apply to the Court or a judge for an order that such counter-claim may be excluded, and the Court or a judge may, on the hearing of such application, make such order as shall be just.

16. If, in any case in which the defendant sets up a counter-claim, the action of the plaintiff is stayed, discontinued, or dismissed, the counter-claim may nevertheless be proceeded with.

17. Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

18. In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances, according to the practice of the Court of Probate, before the principal Act came into operation.

19. In every case in which a party shall plead the general issue, intending to give the special matter in evidence by virtue of an Act of Parliament, he shall insert in the margin of his pleading the words "by statute," together with the year of the reign in which the Act of Parliament on which he relies was passed, and also the chapter and section of such Act, and shall specify whether such Act is public or otherwise; otherwise such defence shall be taken not to have been pleaded by virtue of any Act of Parliament.

20. No plea or defence shall be pleaded in abatement.

21. No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim. He may nevertheless rely upon any ground of defence which he can prove except as hereinbefore mentioned.

ORDER XXII.

PAYMENT INTO AND OUT OF COURT AND TENDER.

1. Where any action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court or a judge, pay into Court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability, (except in actions or counter-claims for libel or slander) pay money into Court which shall be subject to the provisions of Rule 6: Provided that in an action on a bond under the Statute 8 & 9 Will. III. c. 11, payment into Court shall be admissible to particular breaches only, and not to the whole action.

2. Payment into Court shall be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein.

3. With a defence setting up a tender before action, the sum of money alleged to have been tendered must be brought into Court.

4. If the defendant pays money into Court before delivering his defence, he shall serve upon the plaintiff a notice specifying both the fact that he has paid in such money, and also the claim or cause of action in respect of which such payment has been made. Such notice shall be in the Form No. 3 in Appendix B., with such variations as circumstances may require.

5. In the following cases of payment into Court under this Order, viz.:—

- (a.) When payment into Court is made before delivery of defence :
- (b.) When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into Court is made, is not denied in the defence :
- (c.) When payment into Court is made with a defence setting up a tender of the sum paid :

the money paid into Court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the Court or a judge shall otherwise order.

6. When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into Court has been made, is denied in the defence, the following rules shall apply :—

- (a.) The plaintiff may accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him as herein-after provided, notwithstanding the defendant's denial of liability, whereupon all further proceedings, in respect of such claim or cause of action, except as to costs, shall be stayed ; or the plaintiff may refuse to accept the money in satisfaction and reply accordingly, in which case the money shall remain in Court subject to the provisions herein-after mentioned :
- (b.) If the plaintiff accepts the money so paid in, he shall, after service of such notice in the Form No. 4 in Appendix B. as is in Rule 7 mentioned, or after delivery of a reply accepting the money, be entitled to have the money paid out to himself on request, or to his solicitor on the plaintiff's written authority, unless the Court or a judge shall otherwise order :
- (c.) If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in Court and be subject to the order of the Court or a judge, and shall not be paid out of Court except in pursuance of an order. If the plaintiff proceeds with the action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into Court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant. If the defendant succeeds in respect of such claim or cause of action, the whole amount shall, under such order, be repaid to him.

7. The plaintiff, when payment into Court is made before delivery of defence, may within four days after the receipt of notice of such payment, or when such payment is first signified in a defence, may before reply, accept in satisfaction of the claim or cause of action in respect of which such payment has been made the sum so paid in, in which case he shall give notice to the defendant in the Form No. 4 in Appendix B., and shall be at liberty, in case the entire claim or cause of action is thereby satisfied, to tax his costs after the expiration of four days from the service of such notice, unless the Court or a judge shall otherwise order, and in case of non-payment of the costs within forty-eight hours after such taxation, to sign judgment for his costs so taxed.

8. Where money is paid into Court in two or more actions which are consolidated, and the plaintiff proceeds to trial in one, and fails, the money paid in and the costs in all the actions shall be dealt with under this Order in the same manner as in the action tried.

9. A plaintiff may, in answer to a counter-claim, pay money into Court

in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into Court by a defendant.

10. Where money is paid into Court in the Queen's Bench Division under the certificate of a Master or Associate, such payment must be expressly authorised in such certificate.

11. Money paid into Court under an order of the Court or a judge or certificate of a Master or Associate shall not be paid out of Court except in pursuance of an order of the Court or a judge: Provided that, where before the delivery of defence money has been paid into Court by the defendant pursuant to an order under the provisions of Order XIV., he may (unless the Court or a judge shall otherwise order) by his pleading appropriate the whole or any part of such money, and any additional payment if necessary, to the whole or any specified portion of the plaintiff's claim; and the money so appropriated shall thereupon be deemed to be money paid into Court pursuant to the preceding Rules of this Order relating to money paid into Court, and shall be subject in all respects thereto.

12. In the Chancery Division, the manner of payment into and out of Court, and the manner in which money in Court shall be dealt with, shall be subject to the Rules for the time being in force under the Court of Chancery Funds Act, 1872.

13. In the Queen's Bench Division, unless the cause or matter is proceeding in a District Registry, and unless and until any other provision shall be made by Parliament in that behalf, money paid into Court shall be paid into the Bank of England (Law Courts Branch), and the manner of payment into and out of Court, and the manner in which money in Court shall be dealt with, shall be subject to the regulations contained in Appendix M., which the Masters of the Supreme Court, or any four of them, with the consent of the Governor and Company of the Bank of England, may from time to time modify by way of addition or substitution: Provided that if any act shall be passed relating to funds in Court in any Division of the Supreme Court, all money so paid into Court shall be subject to such Rules as may be made under that Act, so far as applicable thereto.

14. All money standing in Court in the Queen's Bench Division on the day on which these Rules come into operation shall thereupon be subject in all respects to the provisions of this Order.

15. In any cause or matter in the Queen's Bench Division in which a sum of money has been awarded to or recovered by an infant, or person of unsound mind not so found by inquisition, the Court or a judge may at or after the trial order that the whole or any part of such sum shall be paid into Court to the credit of an account intitled in the cause or matter; and any sum so paid into Court, and any dividends or interest thereon, shall be subject to such orders as may from time to time be made by the Court or a judge concerning the same, and may either be invested, or be paid out of Court, or transferred to such persons, to be held and applied upon and for such trusts and in such manner, as the Court or judge shall direct.

16. Money paid into Court or securities purchased under the provisions of the last preceding Rule, and the dividends or interest thereon, shall be sold, transferred, or paid out to the party entitled thereto, pursuant to the order of the Court or a judge.

17. Cash under the control of or subject to the order of the Court may be invested in Bank Stock, East India Stock, Exchequer Bills, and £2 10s. per cent. annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated, Reduced, and New £3 per cent. annuities.

18. Every application for the purpose of the conversion of any stocks, funds, or securities into any other stocks, funds, or securities authorized

by the last preceding Rule, shall be served upon the trustees thereof, if any, and upon such other persons, if any, as the Court or judge shall think fit.

19. Subject to any provision which may hereafter be made for that purpose by Parliament, or under any rules to be made by the authority of Parliament, all money paid into Court in Admiralty actions not proceeding in a District Registry shall be paid to the account of "the Admiralty Registrar" at the Bank of England (Law Courts Branch), upon receivable orders to be obtained in the Admiralty Registry.

20. Money paid into Court in an Admiralty action shall not be paid out of Court except in pursuance of an order of the Court or a judge.

21. A solicitor desiring to prevent the payment of money out of Court in an Admiralty action shall file a notice, and thereupon a caveat shall be entered in a book to be kept in the Admiralty Registry called the "Caveat Payment Book."

ORDER XXIII.

REPLY AND SUBSEQUENT PLEADINGS.

1. A plaintiff shall deliver his reply, if any, in Admiralty actions within six days, and in other actions within twenty-one days, after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a judge.

2. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a judge, and then shall be pleaded only upon such terms as the Court or judge shall think fit.

3. Subject to the last preceding Rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a judge.

4. Where a counter-claim is pleaded, a reply thereto shall be subject to the rules applicable to statements of defence.

5. As soon as any party has joined issue upon the preceding pleading of the opposite party simply without adding any further or other pleading thereto, or has made default as mentioned in Order XXVII., Rule 13, the pleadings as between such parties shall be deemed to be closed.

6. No new assignment shall be necessary or used. But everything which was formerly alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim, or by way of reply.

ORDER XXIV.

MATTERS ARISING PENDING THE ACTION.

1. Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be raised by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be raised by the plaintiff in his reply, either alone or together with any other ground of reply.

2. Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply, has expired, the plaintiff may, within eight days after such ground of defence has arisen, or at any subsequent time by leave of the Court or a judge, deliver a further defence or further reply as the case may be, setting forth the same.

3. Whenever any defendant, in his statement of defence, or in any further statement of defence as in the last Rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence (which confession may be in the Form No. 5 in Appendix B., with such variations as circumstances may require), and may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a judge shall, either before or after the delivery of such confession, otherwise order.

ORDER XXV.

PROCEEDINGS IN LIEU OF DEMURRER.

1. No demurrer shall be allowed.

2. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

3. If, in the opinion of the Court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the Court or judge may thereupon dismiss the action or make such other order therein as may be just.

4. The Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

5. No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not.

ORDER XXVI.

DISCONTINUANCE.

1. The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding

in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a judge, but the Court or a judge may before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

2. When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties.

3. Any defendant may enter judgment for the costs of the action, if it is wholly discontinued against him, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued, in case such respective costs are not paid within four days after taxation.

4. If any subsequent action shall be brought before payment of the costs of a discontinued action, for the same, or substantially the same cause of action, the Court or a judge may, if they or he think fit, order a stay of such subsequent action, until such costs shall have been paid.

ORDER XXVII.

DEFAULT OF PLEADING.

1. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or judge may, if no statement of claim shall have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as the Court or judge shall think just.

2. If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs.

3. When in any such action as in the last preceding Rule mentioned there are several defendants, if one of them make default as mentioned in the last preceding Rule, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants.

4. If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant or all the defendants, if more than one, make default as mentioned in Rule 2, the plaintiff may

enter an interlocutory judgment against the defendant or defendants, and a writ of inquiry shall issue to assess the value of the goods, and the damages, or the damages only, as the case may be. But the Court or a judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way which the Court or judge may direct.

5. When in any such action as in Rule 4 mentioned there are several defendants, if one or more of them make default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant or defendants so making default, and proceed with his action against the others. And in such case the value and amount of damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a judge shall otherwise direct.

6. If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and any defendant makes default as mentioned in Rule 2, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in Rules 4 and 5.

7. In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs.

8. Where the plaintiff has endorsed a claim for mesne profits, arrears of rent, or double value in respect of the premises claimed or any part of them, or damages for breach of contract upon a writ for the recovery of land, if the defendant makes default as mentioned in Rule 2, or if there be more than one defendant, some or one of the defendants makes such default, the plaintiff may enter judgment against the defaulting defendant or defendants and proceed as mentioned in Rules 4 and 5.

9. If the plaintiff's claim be for a debt or liquidated demand, the detention of goods and pecuniary damages, or for any of such matters, or for the recovery of land, and the defendant delivers a defence, which purports to offer an answer to part only of the plaintiff's alleged cause of action, the plaintiff may by leave of the Court or a judge enter judgment, final or interlocutory, as the case may be, for the part unanswered; provided that the unanswered part consists of a separate cause of action, or is severable from the rest, as in the case of part of a debt or liquidated demand: provided also that, where there is a counter-claim, execution on any such judgment as above mentioned in respect of the plaintiff's claim shall not issue without leave of the Court or a judge.

10. In probate actions, if any defendant make default in filing and delivering a defence, the action may proceed, notwithstanding such default.

11. In all other actions than those in the preceding rules of this order mentioned, if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to.

12. Where, in any such action as mentioned in the last preceding rule, there are several defendants, then, if one of such defendants makes such default as aforesaid, the plaintiff may either (if the cause of action is severable) set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants.

13. If the plaintiff does not deliver a reply, or any party does not

deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.

14. In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Court or a judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court or judge may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties.

15. Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the Court or a judge, upon such terms as to costs or otherwise as such Court or judge may think fit.

ORDER XXVIII.

AMENDMENT.

1. The Court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

2. The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

3. A defendant who has set up any counter-claim or set-off may, without any leave, amend such counter-claim or set-off at any time before the expiration of the time allowed him for answering the reply and before such answer, or in case there be no reply then at any time before the expiration of twenty-eight days from defence.

4. Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading apply to the Court or a judge to disallow the amendment, or any part thereof, and the Court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may be just.

5. Where any party has amended his pleading under rules 2 or 3, the opposite party shall plead to the amended pleading, or amend his pleading, within the time he then has to plead or within eight days from the delivery of the amendment, whichever shall last expire; and in case the opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.

6. In all cases not provided for by the preceding rules of this order, application for leave to amend may be made by either party to the Court or a judge or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just.

7. If a party who has obtained an order for leave to amend does not

amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a judge.

8. An indorsement or pleading may be amended by written alterations in the copy which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the document difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the document as amended.

9. Whenever any indorsement or pleading is amended, the same, when amended, shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz.: "Amended day of , pursuant to order of , dated the of ."

10. Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same.

11. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal.

12. The Court or a judge may at any time, and on such terms as to costs or otherwise as the Court or judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

13. The costs of and occasioned by any amendment made pursuant to Rules 2 and 3 of this Order shall be borne by the party making the same, unless the Court or a judge shall otherwise order.

ORDER XXXII.

ADMISSIONS.

1. Any party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the Court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

3. A notice to admit documents shall be in the Form No. 11 in Appendix B., with such variations as circumstances may require.

4. Any party may, by notice in writing, at any time not later than 9 days before the day for which notice of trial has been given, call on any other party to admit for the purposes of the cause, matter, or issue only,

any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within 6 days after service of such notice, or within such further time as may be allowed by the Court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the Court or a judge certify that the refusal to admit was reasonable, or unless the Court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice; provided also, that the Court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

5. A notice to admit facts shall be in the Form No. 12, in Appendix B. and admissions of facts shall be in the Form No. 13, in Appendix B. with such variations as circumstances may require.

6. Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a judge may upon such application make such order, or give such judgment, as the Court or judge may think just.

7. An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof be required.

8. Notice to produce documents shall be in the Form No. 14, in Appendix B., with such variations as circumstances may require. An affidavit of the solicitor, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

9. If a notice to admit or produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

ORDER XXXIII.

ISSUES.

1. Where in any cause or matter it appears to the Court or a judge that the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues, and such issues shall, if the parties differ, be settled by the Court or a judge.

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